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JURISDICTIONAL DISCRIMINATION AND FULL FAITH AND CREDIT

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Michael G. Collins^{**}

ABSTRACT

In Hughes v. Fetter (1951), the Supreme Court ruled that state courts are ordinarily required—as a matter of the Full Faith and Credit Clause—to take jurisdiction of claims arising under sister-state law, their own wishes notwithstanding. Hughes remains a foundational case for conflict of laws and interstate relations. It is said to embody the principles that states should maximize one another’s policies, and cannot discriminate against sister-state laws. Some scholars, moreover, have argued for extensions of Hughes’s nondiscrimination norm to choice of law, to public policy exceptions to applying sister-state law, and to Congress’s stripping federal courts of jurisdiction. This Article argues that Hughes was wrong. The decision is justified neither by history nor precedent under the Clause, nor by a policy maximization rationale. And its nondiscrimination norm fits poorly with states’ general ability, in the choice-of-law area, to prefer their own law over sister-state law in cases that they choose to entertain. This Article argues that states should be under a much more limited duty, grounded in a litigant’s substantive entitlement to redress, rather than a duty not to discriminate against the law of sister states. Arguments that other scholars have made for extension of Hughes’s rule of nondiscrimination against the law of other sovereigns in the choice of law, public policy, and jurisdiction-stripping settings should therefore draw little support from the doubtful result in Hughes.

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INTRODUCTION

The Constitution declares that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”¹ The states’ obligation to respect other states’ judgments—their “judicial Proceedings”—is probably the most familiar aspect of the Clause, and questions as to the scope of that obligation have a history going back to the early Republic. In addition, the modern Court has read the Full Faith and Credit Clause as sometimes requiring state courts, as a matter of choice of law, to apply sister-state law (their “public Acts”) in cases that they entertain. Related to this requirement, the modern Court has also read the Clause to require states to open their courthouse doors and take jurisdiction of claims under sister-state law even if they would prefer not to entertain them.²

The last of these obligations—the door-opening obligation—is distinguishable from the choice-of-law obligation, although the Court treats both as deriving from the obligation to give full faith and credit to the laws of sister states. The choice-of-law obligation merely tells a state that chooses to exercise jurisdiction over an action that it might have to apply sister-state law rather than its own law; but it does not tell states that they must hear the particular action. Full faith and credit constraints on choice of law, however, have proved to be quite minimal,³ whereas the Court has articulated a stronger full faith and credit obligation to hear sister-state causes of action. In this Article, we critique the jurisdictional, or door-opening obligation, of the Full Faith and Credit Clause.

The Supreme Court’s 1951 opinion in *Hughes v. Fetter* is the canonical decision establishing duties to take jurisdiction of sister-state causes of action

¹ U.S. CONST. art. IV, § 1.

² By “claims under sister-state law” and “sister-state cause of action,” we mean causes of action that, under the choice-of-law rules of the forum state, would be claims arising under the law of a sister state.

³ See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313, 318–19 (1981) (applying weak rational basis scrutiny to a state’s choice of law).

as a matter of full faith and credit.⁴ In *Hughes*, the Court required Wisconsin's courts to entertain a wrongful death action arising under the law of Illinois, which the Wisconsin courts had refused to hear.⁵ The *Hughes* Court found precedent for its door-opening rule in an earlier decision⁶—*Broderick v. Rosner*—in which the Court held that New Jersey had to entertain an action under New York law against New Jersey shareholders of an insolvent New York corporation.⁷ *Hughes* and *Broderick* added a layer of constitutional compulsion to what had theretofore been a regime of interstate comity, which embodied a general respect for sister-state laws, but under which states generally retained the option whether to hear claims based on sister-state law.

Despite the relatively late appearance of a constitutionally driven state-court duty to entertain sister-state causes of action, *Hughes* has become a foundational case for interstate relations and conflict of laws. It rests upon and provides support for a notion that the Full Faith and Credit Clause has a largely self-executing effect, respecting the obligation of states to apply the statutory and common law of other states.⁸ The *Hughes* Court also stated that the Full

⁴ 341 U.S. 609, 613 (1951).

⁵ *Id.* at 610–13.

⁶ *Id.* at 611 & n.6.

⁷ 294 U.S. 629, 647 (1935).

⁸ *See, e.g.*, LEA BRILMAYER, CONFLICT OF LAWS § 3.3.1, at 151 & n.48 (2d ed. 1995) (citing *Hughes* for a duty, based on the Full Faith and Credit Clause, to entertain sister-state actions); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 101, at 319 (rev. 3d ed. 2002) (indicating that *Hughes* “makes good sense in light of the unifying object of that clause”). Other scholars have questioned *Hughes*'s result or its reasoning. Brainerd Currie criticized the Court's reliance on Full Faith and Credit, in light of Wisconsin's having sufficient interest to apply its own law. BRAINERD CURRIE, *The Constitution and the “Transitory” Cause of Action*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 283, 287 (1963). He would have upheld the result, however, based on Wisconsin's having denied equal protection by subjecting its own residents to an irrational classification based on where the death occurred. *Id.* at 304–07, 350; *see also* ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW: CASES AND MATERIALS 247 (5th ed. 2010) (indicating that, because Wisconsin had enough contacts to apply its own law, the decision was questionable as a full faith and credit decision, and indicating support of Currie's equal protection rationale); Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-traditional Marriages*, 32 CREIGHTON L. REV. 147, 160–61, 168 (1998) (indicating that *Hughes*'s nondiscrimination rule had been undermined by later decisions, although suggesting some support for Currie's equal protection rationale).

Although we do not believe the Equal Protection Clause would forbid classifying residents' claims based on where they occurred, our argument against *Hughes*'s nondiscrimination principle is grounded in part on its discordance with the Court's choice-of-law decisions. *See infra* Part IV.C. Russell Weintraub aptly criticized *Hughes* on the ground that there is generally only a “relatively slight national need for according full faith and credit to a sister state statute by providing a forum for suit on a statutory cause of action not yet reduced to judgment.” RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 9.3A, at 710 (6th ed. 2010). And Samuel Jordan has recently argued that the current availability of personal jurisdiction in other forums argues against the continued viability of a nondiscrimination rule, and that the Court should focus on

Faith and Credit Clause looks to the “maximum enforcement” of sister-state laws,⁹ and stands for a principle that forum states cannot “discriminate” against the laws of sister states.¹⁰

Moreover, scholars enlist *Hughes* to argue for a number of extensions of its supposed principles. First, they have argued that *Hughes* supports a generalizable nondiscrimination principle respecting the law of sister states, thereby restricting states from routinely preferring their own law in choice-of-law decisions.¹¹ Second, they have argued that the nondiscrimination principle should invalidate state public policy exceptions in choice of law, such as when states deny recognition to out-of-state same-sex marriages.¹² And third, in an extension of *Hughes* into the federal courts arena, scholars have argued that its nondiscrimination principle should prevent Congress from carving out federal court jurisdiction over constitutional claims that it disfavors.¹³

whether a court’s declining jurisdiction would cause prejudice to the out-of-state claim. *See* Samuel P. Jordan, *Reverse Abstention*, 92 B.U. L. REV. 1771, 1803–05, 1812 (2012) We agree with Jordan that substantive impacts, rather than discrimination, should govern jurisdictional duties. *See infra* Parts IV.B–C.

⁹ *Hughes*, 341 U.S. at 612; *see* Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 836 (1983) (citing to the “maximum enforcement” rationale of *Hughes* as the aim of the Full Faith and Credit Clause, so as generally to require enforcement of other states’ claims, with exceptions such as for a valid public policy objection); Larry Kramer, *Same-Sex Marriage, Conflict of Law, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1983 (1997) (citing with approval the maximum enforcement rationale of *Hughes*); *cf.* KERMIT ROOSEVELT, III, *CONFLICT OF LAWS* 143–44 (2010) (treating *Hughes* as correct and standing for the principle that a “court needs some justification to refuse to enforce foreign rights”).

¹⁰ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518 (1953) (characterizing *Hughes* as forbidding the forum from laying an “uneven hand on causes of action arising within and without the forum state”); Kramer, *supra* note 9, at 1983 (indicating that the Wisconsin courts had inappropriately discriminated against sister-state laws).

¹¹ *See* Kramer, *supra* note 9, at 1985–86 (using *Hughes* to support a prohibition on discrimination in choice of law); *cf.* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250–51 (1992) (arguing for uniform choice-of-law rules based partly on the full faith and credit principle that states must treat sister states as equal in authority to themselves).

¹² Kramer, *supra* note 9, at 1966–67 (arguing against a public policy exception in choice of law); Laycock, *supra* note 11, at 313 (same). *See generally* *United States v. Windsor*, 133 S. Ct. 2675, 2682–83, 2695–96 (2013) (invalidating section 3 of the Defense of Marriage Act, 110 Stat. 249, 1 U.S.C. § 7, on grounds that Fifth Amendment liberty and equality norms were violated by the federal government’s seeking to injure a class of marriages that states sought to protect).

¹³ Brilmayer & Underhill, *supra* note 9, at 825–26, 828–29 (using *Hughes* to support a general doctrine forbidding discrimination against equal or higher sources of law and that also forbids Congress from stripping constitutional cases from federal jurisdiction if it does not strip comparable statutory cases as well). *Hughes* is also invoked to support state duties to entertain federal claims. *See, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 380–83 (1990) (citing *Hughes* for the proposition that a state’s denominating its rule as jurisdictional could not negate its constitutional duties to hear sister-state—and by extension federal—claims); *cf.* *Haywood v. Drown*,

This Article takes issue with the decision in *Hughes*, including its claims of maximizing state interests and its nondiscrimination principle. In addition, this Article takes issue with those scholars who support *Hughes* and who seek to expand it into other areas. Part I shows that the Full Faith and Credit Clause was long understood as not requiring states to apply sister-state laws, nor to entertain unwanted jurisdiction over sister-state claims. Part II then traces the development of a limited constitutional duty to entertain causes of action under sister-state law in shareholder liability actions, leading to the Court's decision in *Broderick v. Rosner*. Part III discusses preludes to *Hughes* in the treatment of wrongful death cases and in debates about plaintiff forum choice. Part IV then describes the extension of the duty to entertain out-of-state causes of action in *Hughes*, and responds to arguments by modern conflicts scholars in support of that decision. Finally, Part V addresses and critiques arguments that scholars have made to extend the reasoning of *Hughes* to other areas.

I. THE LATE ARRIVAL OF FULL FAITH AND CREDIT TO SISTER-STATE LAWS

The modern Supreme Court treats the obligation to entertain sister-state causes of action as part of the Constitution's command to provide full faith and credit to sister-state laws. Yet for many years, as discussed in Part I.A, the Full Faith and Credit Clause was not perceived as commanding the states to enforce sister-state causes of action, or to apply sister-state law in preference to their own. Rather, such matters were addressed by the subconstitutional principle of comity among the states, and by general rules regarding choice of law derived from the law of nations. Indeed, as discussed in Part I.B, it was not until the late nineteenth century that the Supreme Court clearly indicated that the Clause itself—as distinguished from the full faith and credit statute—dictated the effect to be given to sister-state *judgments*. And it was not until then that the Court also began to constitutionalize choice-of-law and jurisdictional obligations as a matter of full faith and credit to sister-state laws.

A. *Full Faith and Credit Revisionism*

A number of revisionist scholars have argued that the Full Faith and Credit Clause did not itself declare the effect that states had to give the “public Acts,

556 U.S. 729, 740 n.7 (2009) (citing *Hughes* for a similar proposition, in a decision invalidating a seemingly neutral state jurisdictional rule that the Court saw as expressing disagreement with federal policy). This Article addresses state duties to entertain federal actions only briefly. See *infra* text accompanying notes 243–53.

Records and judicial Proceedings” of sister states.¹⁴ They argue that as a matter of original understanding, the effect to be given sister-state judgments was primarily a function of the Clause’s grant of power to Congress “to prescribe” their “Effect,” and *not* a function of the Clause’s command to give them “Full Faith and Credit.”¹⁵ For these scholars, the Constitution’s command merely imposed an evidentiary rule that obliged states to receive sister-state laws, records, and judicial proceedings as good or sufficient evidence of what they purported to be.¹⁶ And in the case of judgments, for example, states were not required to give them more than *prima facie* effect respecting the validity of the underlying claim—consistent with traditional notions of international comity.¹⁷ Instead, revisionists assert that it was because Congress had declared the effect of state court judgments—in a 1790 statute implementing the Full Faith and Credit Clause—that the Court eventually determined that states must give the same effect to a sister-state judgment that the judgment-rendering state would give it.¹⁸ Indeed, they argue, when it did so, the Court clearly indicated that it was the 1790 *statute* that compelled such a result, not the Constitution.¹⁹

Although giving such a limited scope to the Clause may seem odd, the revisionist argument is not without support. Among other things, revisionists point to the fact that Article IV of the Articles of Confederation had included a similar command that “[f]ull faith and credit shall be given” to the “records, acts, and judicial proceedings” of sister-state courts,²⁰ but it lacked any provision permitting Congress to prescribe their effect by statute.²¹ Litigation under the Articles produced little clear evidence that its full faith and credit command obliged states to give conclusive effect to all sister-state judgments,

¹⁴ This Part provides an overview of the work of several revisionist scholars. *See, e.g.*, David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 *YALE L.J.* 1584 (2009); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 *VA. L. REV.* 1201 (2009); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 *CREIGHTON L. REV.* 255 (1998).

¹⁵ *See e.g.*, Sachs, *supra* note 14, at 1206.

¹⁶ *See, e.g., id.*; Whitten, *supra* note 14, at 257.

¹⁷ The views of Professor Engdahl appear to differ from those of Professors Sachs and Whitten over whether the Clause itself required that sister-state judgments be given *prima facie* effect. *See* Charles M. Yablon, *Madison’s Full Faith and Credit Clause: A Historical Analysis*, 33 *CARDOZO L. REV.* 125, 128 n.5 (2011) (noting that Engdahl alone attributes such effect to the Clause itself).

¹⁸ *See, e.g.*, Engdahl, *supra* note 14, at 1594; *see also* *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484–85 (1813) (holding, arguably based upon the act rather than the constitutional text, that states must give the same effect to a sister-state’s judgment as that state would).

¹⁹ *See, e.g.*, Engdahl, *supra* note 14, at 1649.

²⁰ *See* ARTICLES OF CONFEDERATION of 1778, art. IV, para. 3 (“Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State.”).

²¹ *See, e.g.*, Engdahl, *supra* note 14, at 1594.

as opposed to leaving the question to general principles of comity.²² In *The Federalist No. 42*, James Madison stated that the phrase “full faith and credit” was “extremely indeterminate,”²³ and that it could be “of little importance” absent improvements upon the Articles’ similar language—such as an enforcement power in Congress.²⁴ Similarly, during the ratification debates, James Wilson stated that “if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all Independent Nations.”²⁵ As for the argument that the Full Faith and Credit Clause must have done something to unify the states more tightly than had the treaty-like Articles of Confederation, revisionists suggest that it did so primarily in its grant of power to Congress to prescribe the interstate effect of state laws, records, and judgments.²⁶

Early practice also supports the revisionists, although the historical record is hardly unequivocal. Initially, courts were divided over whether the full faith and credit statute even required that conclusive effect be given to sister-state judgments.²⁷ But the debate (and its eventual resolution in favor of such a result) would have been pointless had the Constitution itself been clearly understood to dictate such effects. In addition, the first Congresses seemed to perceive that the interstate effects of state judgments were a matter for their own determination, rather than being decreed by the Constitution.²⁸

We shall not rehearse all of the revisionist arguments here. But if the conventional wisdom is wrong in supposing that the unimplemented Full Faith and Credit Clause imposes an obligation upon states to enforce sister-state judgments, then the Court’s anti-door-closing decisions are likely wrong as well, at least to the extent that they are premised on the Clause’s unimplemented obligation to give full faith and credit to sister-state laws.

Moreover, even if one adheres to the now-conventional wisdom with respect to judgments, serious doubts about its accuracy should caution against

²² See Sachs, *supra* note 14, at 1224–26.

²³ THE FEDERALIST No. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961).

²⁴ *Id.*

²⁵ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488 (Max Farrand ed., rev. ed. 1966) (Madison’s notes). Professor Yablon believes that, in context, Wilson’s statement was likely addressed to declaring the effect of laws rather than judgments. See Yablon, *supra* note 17, at 169–70.

²⁶ See generally sources cited *supra* note 14.

²⁷ See Engdahl, *supra* note 14, at 1640–47. The Court eventually ruled in favor of conclusive effect in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813).

²⁸ See generally Sachs, *supra* note 14, at 1231–76 (examining “The Legislative History of Full Faith and Credit”).

strong arguments being made from the Clause for a constitutionally driven rule of jurisdictional nondiscrimination. Even scholars who are skeptical of the historical accuracy of the revisionists' evidentiary account of full faith and credit to judgments have concluded that the evidentiary account may be proper for full faith and credit to laws.²⁹ And those in the early Republic—such as Joseph Story—who seemed to suppose that the Clause itself might compel the effect to be given to sister-state judgments, also supposed that the obligation to enforce sister-state laws was a matter of comity only.³⁰ A necessary corollary of comity, however, was the principle that states could refuse to enforce sister-state laws, and thereby shut their doors to such claims.³¹

B. The Absence of Resort to the Full Faith and Credit Clause

Furthermore, during most of the nineteenth century, neither litigants nor the courts seemed to suppose that the Constitution obligated states to enforce sister-state laws. In fact, arguments respecting the effect to be given to sister-state laws as a matter of full faith and credit were noticeable for their absence during this time.³² Some scholars have suggested that the want of discussion of full faith and credit in the choice-of-law setting may be explained by the fact that states long adhered to roughly similar conflict-of-laws principles with respect to the common law.³³ But that cannot explain the scarcity of full faith and credit arguments in the three settings noted below—recognition of out-of-state corporations, slave status, and sister-state marriages—where opportunities for such arguments did present themselves. The lack of constitutional discourse about full faith and credit to sister-state laws in general, and in these three

²⁹ See Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 531–32 (2013).

³⁰ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 70 n.115 (1990) (noting Story's position); JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 23, at 24 (1834) (“[W]hatever force and obligation the laws of one country have in another, depends solely on the laws, and municipal regulations of the latter . . .”).

³¹ STORY, *supra* note 30, § 23, at 24.

³² See Clyde Spillenger, *Risk Regulation, Extraterritoriality, and the Constitutionalization of Choice of Law, 1865–1940*, at 6 (Feb. 15, 2012) (unpublished manuscript), <http://ssrn.com/abstract=2006719> (“The notion that the Full Faith and Credit Clause or any other part of the U.S. Constitution . . . [was] relevant to the field of conflict of laws, was almost wholly absent from American law prior to the early twentieth century.”).

³³ See, e.g., ROOSEVELT, *supra* note 9, at 114 (“Given the territorial limits to the scope of state laws, conflict between them was simply impossible.”); cf. Spillenger, *supra* note 32, at 26 (stating that because rules of common law “were still regarded as universal in nature, there was little occasion for regarding a court’s application of its own common-law rule of decision as an excessive or illegitimate assertion of the state’s sovereign authority”).

areas, suggests that the Clause was long understood not to dictate the force and effect of the laws of one state in another state.

For example, states were not under a general obligation to permit out-of-state corporations to conduct business within their borders, despite the fact that sister-states' acts of incorporation were "public Acts" arguably subject to recognition under the Full Faith and Credit Clause. The Court held that the extent to which states allowed out-of-state corporations to operate within their borders was primarily a subconstitutional question of comity between states.³⁴ The fact that litigants did not raise, and the Court did not address, the Full Faith and Credit Clause suggests that it was not perceived as viable source of arguments for adherence to sister-state law.

In addition, antebellum courts that considered the status of a slave taken to a free state did not understand full faith and credit to have anything to say about the matter, even though the effect of sister-state laws was at issue in those cases.³⁵ Rather, recognition of sister-state laws respecting slavery remained a matter of comity, not constitutional compulsion.³⁶ Indeed, a proslavery treatise writer observed on the eve of the Civil War that the Full Faith and Credit Clause "has never attracted attention" in the slavery setting.³⁷

³⁴ See, e.g., *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 525, 591–93 (1839); Spillenger, *supra* note 32, at 23 (discussing the lack of duty to recognize out-of-state corporations). To the extent the Constitution was even brought up, discussion tended to focus on Article IV's Privileges and Immunities Clause or the Commerce Clause—not the Full Faith and Credit Clause. The Court specifically rejected an argument that corporations were "citizens" under Article IV, entitled to equal privileges and immunities when operating in sister states, stating that the Privileges and Immunities Clause was not intended "to give to the laws of one State any operation in other states. They can have no such operation, except by the permission, express or implied, of those States." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869). The Court did later hold that the Commerce Clause imposed some limits on the state's imposition of conditions on out-of-state corporations. See, e.g., *Hooper v. California*, 155 U.S. 648, 652, 655–56 (1895) (upholding a Commerce Clause challenge to particular bonding requirements for out-of-state insurance companies).

³⁵ See PAUL FINKELMAN, *AN IMPERFECT UNION* 32 (1981); *id.* at 306–07 (noting that full faith and credit arguments were sometimes raised in state courts); see also Seth F. Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161, 167–68 (1996) (indicating that issues of slave status were matters of comity); Spillenger, *supra* note 32, at 24 (discussing slavery issues as an example where the concern as to extraterritoriality was that states would have to entertain foreign-created rights and powers).

³⁶ See Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1880 (noting in the slavery context that "[t]he American reliance on comity was not constitutionally required").

³⁷ 1 THOMAS R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* 196 (1858). Cobb noted, however, that Congress might be able to resolve such issues pursuant to its power to prescribe the effects of sister-state laws. See *id.* This suggestion—from one who might be inclined to get as much mileage as possible out of the Clause itself to protect slave owners—further supports the view that

To be sure, the Constitution did require states to honor sister-state slave laws in Article IV's Fugitive Slave Clause by requiring the return of slaves.³⁸ But that was likely because Full Faith and Credit would not have required a state to give effect to a sister-state law respecting slave status.³⁹

A final area where full faith and credit might have played a role, but did not, was interstate recognition of marriages. Recognition of a sister-state marriage arguably implicated the faith and credit to be given to sister-state "public Acts" or "Records." But like questions regarding the status of a person as free or slave, questions of marriage recognition were treated as a question of comity only.⁴⁰ And the basic principle, as remains true in most jurisdictions today, was to recognize a marriage as valid if it was valid in the place of celebration, subject however to a public policy exception such as for polygamous or incestuous unions.⁴¹

The general nonreliance on full faith and credit did not mean that states did not enforce one another's laws either in a jurisdictional or in a choice-of-law sense. As a matter of choice, states often exercised jurisdiction over other states' causes of action, and they also applied other states' law, particularly as to "transitory" actions.⁴² Transitory actions typically included common law claims such as those based on tort and contract.⁴³ On the other hand, states were somewhat less likely to entertain sister-state statutory actions.⁴⁴ They

respect for sister-state laws was not understood as a matter of constitutional compulsion under the unimplemented Full Faith and Credit Clause.

³⁸ See U.S. CONST. art. IV, § 2, cl. 3.

³⁹ Kreimer, *supra* note 35, at 168 ("The impetus for the inclusion of the Fugitive Slave Clause in Article IV was the understanding that in its absence, a free state would be entitled to treat a slave who escaped to its territory as free pursuant to local law.")

⁴⁰ See, e.g., Borchers, *supra* note 8, at 155 (discussing the long history of states' use of public policy exceptions to refuse recognition). See generally Wardle, *supra* note 36, at 1893–1903 (discussing the extent to which comity was accorded controversial marriages).

⁴¹ Cf. Wardle, *supra* note 36, at 1893 (noting that comity was the "default position," but "generally yielded" in the face of strong public policy concerns). But see Kramer, *supra* note 9, at 1967 (suggesting a constitutional obligation to recognize sister-state marriages valid where celebrated).

⁴² See Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 956 (2006).

⁴³ See *id.* at 956–57 (2006) (noting personal injury actions were considered transitory, which sovereigns could entertain as a matter of power rather than duty); *id.* at 957 (stating that real property and penal actions were considered to be local).

⁴⁴ See, e.g., *Dennick v. R.R. Co.*, 103 U.S. 11, 21 (1880) (treating a statutory wrongful death action as transitory for purposes of federal court jurisdiction, but noting contrary authority in the states); cf. Monrad G. Paulson & Michael I. Sovern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969, 974 (1956) ("Some of the early death act cases refusing to apply foreign law were clearly grounded in the notion that

might characterize such actions as “local” (and thus a proper subject only for the courts in the state in which the statute operated) or they might simply exercise their discretion to decline jurisdiction over admittedly transitory actions.⁴⁵

As indicated by the above discussion, however, for the better part of the nineteenth century the Supreme Court never clearly suggested that the Full Faith and Credit Clause had self-enforcing effect, even as to judgments, and much less as to sister-state laws (including both choice-of-law and jurisdictional obligations). When the Clause was mentioned with respect to judgment enforcement, it was generally in combination with the full faith and credit statute.⁴⁶ And the Clause was scarcely mentioned at all with respect to enforcement of sister-state laws.

It was only in the late nineteenth and early twentieth century that the Court began to indicate that the Constitution on its own might require the enforcement of sister-state judgments. The Court provided no explanation for its move, and it was probably unnecessary given that the statute provided a sufficient basis for judgment recognition.⁴⁷ Around the same time, the Court also began to refer to constitutional limits on choice of law,⁴⁸ as well as obligations to entertain sister-state actions—here, without explaining why it should not await congressional legislation. We discuss these developments below, focusing on how the Court eventually arrived at its principal precedents for imposing jurisdictional obligations on the states pursuant to the Full Faith and Credit Clause.

statutory law was local in character.”); Spillenger, *supra* note 32, at 29–30 (noting that some commentaries treated wrongful death statutes as local, but noting that *Dennick* treated the actions as transitory).

⁴⁵ See Spillenger, *supra* note 32, at 30 & n.76.

⁴⁶ See, e.g., *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 461 (1873) (referring to the Constitution and the statute); see also, e.g., *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 291 (1888) (same).

⁴⁷ See, e.g., *Phoenix Fire & Marine Ins. Co. v. Tennessee*, 161 U.S. 174, 185 (1896) (stating that the Constitution provides for conclusive effect to judgments); *Clarke v. Clarke*, 178 U.S. 186, 195 (1900) (referring to the Constitution without reference to the statute); *Harris v. Balk*, 198 U.S. 215, 221 (1905) (referring to full faith and credit required by the Constitution).

⁴⁸ See *infra* text accompanying notes 81–90; see also CURRIE, *supra* note 30, at 70 n.115 (noting early twentieth century “suggestions” that full faith and credit applied outside the judgment setting). The earliest suggestion from the Court was in *Chicago & Alton Railroad v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1877), stating that “public acts” would include a sister-state statute of incorporation.

II. *BRODERICK V. ROSNER* AND THE PROBLEM OF SHAREHOLDER LIABILITY

In *Hughes v. Fetter*, the Supreme Court imposed a general door-opening obligation on the state courts, relying chiefly on the earlier decision in *Broderick v. Rosner*. *Broderick* was one of the first decisions in which the Court clearly held that state courts were under a constitutional obligation to entertain sister-state causes of action, purely as a matter of full faith and credit to sister-state laws.⁴⁹ But as we argue below, *Broderick* and the precedents on which it was based provided little support for the broad obligation articulated in *Hughes*.

Broderick was an action brought in a New Jersey state court to enforce an administrative assessment against the New Jersey shareholders of an insolvent New York bank.⁵⁰ On direct review, the U.S. Supreme Court concluded that the New Jersey courts could not refuse to entertain the action against the shareholders.⁵¹ Understanding *Broderick* requires a brief look into shareholder liability actions—actions in which creditors or representatives of insolvent corporations could require shareholders to contribute to the payment of the corporation’s debts. The shareholder liability actions that preceded *Broderick* show that the Court’s primary concern in imposing a jurisdictional obligation was to preserve the plaintiff’s ability to enforce what the Court saw as an undeniable contractual obligation.

A. *Corporate Insolvency and Shareholder Liabilities*

In this Part (II.A), we first describe shareholder liability actions. We then discuss the Court’s requiring forum states to entertain such shareholder actions under the law of sister states by creditors (Part II.A.1) and corporate assignees (Part II.A.2). In both instances, as shown by Part II.A.3, the Court relied on the contractual nature of shareholders’ obligation, as well as the shareholders’ privity with the corporation against whom a judgment of insolvency had been entered. The contractual nature of the obligation is further shown by the lack of a requirement that sister states entertain directors’ liability actions, which were not considered to be contractual (Part II.A.4). The importance of contractual obligations is also reinforced by choice-of-law cases involving insurance contracts (Part II.A.5).

⁴⁹ The Court had, by the time of *Broderick*, already used full faith and credit in the choice-of-law area. See *infra* text accompanying notes 82–86.

⁵⁰ 294 U.S. 629, 638 (1935).

⁵¹ *Id.* at 643.

At common law, shareholders were not liable for the debts of corporations, except to the extent of unpaid initial stock subscriptions.⁵² A number of states, however, departed from the common law rule and provided by statute for individual shareholder liability in the event of corporate insolvency, in order to create a fund for creditors. These statutes typically provided for liability in an amount up to the par value of the stock—a liability that was distinct from and in addition to any amounts owing with respect to the initial stock subscription.

1. Actions by Creditors

Some states' incorporation laws provided for direct suits by individual creditors against the shareholders of insolvent corporations for this additional recovery. State law generally required the creditor first to obtain a judgment against the corporation. If the creditor could not satisfy the judgment from corporate assets, the creditor could then sue individual stockholders for an amount up to their statutory liability.⁵³

Questions arose as to how far a sister-state forum—i.e., not a court in the incorporating state—was required to entertain these creditor-initiated suits. In 1883, the U.S. Supreme Court, as a matter of general law, required a lower federal court to entertain a diversity action brought by creditors against a stockholder under the law of a state other than that in which the federal court sat.⁵⁴ Somewhat later, the Court extended the obligation to entertain creditor suits against shareholders to state courts outside the state of incorporation. A creditor had obtained an initial judgment in a Kansas federal court that could not be satisfied against the insolvent corporation, and the creditor subsequently sued a shareholder in Rhode Island.⁵⁵ The Court treated the matter as one of recognition of judgments, and posed the issue accordingly: “What then is the

⁵² See S. WALTER JONES, A TREATISE ON THE LAW OF INSOLVENT AND FAILING CORPORATIONS § 65, at 66 (1908) (noting that some states by charter had provided for such liability, in addition to the common law liability for unpaid subscriptions).

⁵³ See, e.g., *Whitman v. Oxford Nat'l Bank*, 176 U.S. 559, 562–63 (1900).

⁵⁴ *Flash v. Connecticut*, 109 U.S. 371, 379 (1883) (holding that a Florida federal court must entertain a creditor's suit against a stockholder under New York law). The Court, however, did not indicate that state courts were under a similar obligation to entertain such actions brought under the law of sister states, and later noted a “diversity of opinion in the courts of the different states” as to enforcing such out-of-state liabilities. See *Fourth Nat'l Bank v. Francklyn*, 120 U.S. 747, 758 (1887); JONES, *supra* note 52, § 382, at 487 (“The federal courts have been much more inclined to enforce the liability imposed upon stockholders by the statutes than the state courts, and the tendency of the latter cases is becoming more so.”).

⁵⁵ *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 640, 644 (1900). The judgment against the corporation was from a federal court, but the Court treated the matter as no different than if the judgment were from a state court. *Id.* at 645.

faith and credit given by law or usage in the courts of Kansas to a judgment against a corporation?”⁵⁶ The Court treated the shareholder as bound by the initial judgment against the corporation, although he could still raise individual defenses such as having previously paid the statutory amount.⁵⁷

2. *Actions by Statutory Assignees*

Another arrangement for resolving debts of insolvent corporations was where a state’s laws prescribed special proceedings for certain insolvencies, such as those of insurance companies. Such statutes might designate a statutory assignee, such as the commissioner of insurance, to succeed to the rights of the corporation. A court in the incorporating state would make a determination of insolvency, thereby authorizing the statutory assignee’s gathering of corporate assets. Where the incorporating state provided for shareholder liability, the court would determine the necessity of the assessment, and the assignee could then bring judicial proceedings against individual shareholders.⁵⁸ As had happened with creditors’ suits, the Supreme Court first directed federal courts to entertain the suits brought by out-of-state assignees,⁵⁹ but later extended the obligation to state courts.⁶⁰ The Court treated the shareholder as bound by the decree from the incorporating state that the corporation was insolvent, that the assignee possessed all rights of the corporation, and that the assessment against stockholders was required.⁶¹

3. *The Rationale for Requiring Enforcement of Out-of-State Shareholder Liabilities*

One might wonder how the judgment in the initial forum would bind an individual out-of-state shareholder who was not personally served with process

⁵⁶ *Id.* at 643.

⁵⁷ *Id.*

⁵⁸ *See, e.g.,* Bernheimer v. Converse, 206 U.S. 516, 525–26 (1907).

⁵⁹ *Id.* at 525, 534–35 (affirming the lower federal court that had taken jurisdiction, and also rejecting Contracts Clause objections to changes in Minnesota law that provided for an assignee capable of suing in other states, and thus making the contractual rights of the creditors more effectual). The state had provided for a statutory assignee at least in part to get around the Court’s holding that equity receivers need not be recognized in other states, because they were officers only of the court that appointed them. *See id.* at 525. Unlike equity receivers, statutory assignees succeeded to the property and rights of the corporation, and therefore could sue in other states to the same extent the corporation could have. *Id.* at 534–35.

⁶⁰ *See* Converse v. Hamilton, 224 U.S. 243, 261 (1912).

⁶¹ *Bernheimer*, 206 U.S. at 532–33. As was true of creditor-initiated suits, individual defenses, such as prior payment, remained available. *See id.* at 528.

in the initial action.⁶² This binding quality, however, followed from the Court's view that the liability of the shareholder "though statutory in its origin, is contractual in its nature."⁶³ The shareholder, by investing, had voluntarily entered a contractual relationship with the corporation (and by extension, with its creditors) that included state law as to shareholder liability.⁶⁴ "Upon acquiring stock," said the Court, "the stockholder incurred an obligation arising from the [state] constitutional provision [providing for stockholder liability], contractual in its nature and, as such, capable of being enforced in the courts not only of that State, but of another State and of the United States."⁶⁵

By virtue of this voluntary agreement, the shareholder was effectively in privity with the corporation, and "the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to."⁶⁶ Thus, recognition of *judgments* under the Full Faith and Credit Clause was an important element in all of the creditor and assignee cases against shareholders that the Court forced upon states prior to the Court's decision in *Broderick v. Rosner*.

These decisions, however, also implicated full faith and credit to sister-state laws, not just to judgments. For example, in a case in which the Court required a state to entertain an action by a statutory assignee against shareholders, the Court held that "the laws of Minnesota and the judicial proceedings in that State, upon which . . . [the] right to relief [was] grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States."⁶⁷ While

⁶² *Id.* at 531–32 (noting the problem of personal jurisdiction against out-of-state shareholders in the context of receiver and assignee actions).

⁶³ *Whitman v. Oxford Nat'l Bank*, 176 U.S. 559, 563 (1900) (entertaining a creditor's federal court action against a shareholder); *cf.* James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1527–28 (2008) (including stockholder liability cases as examples of where "the Court deployed the Full Faith and Credit Clause by recognizing new forms of status, typically arising out of some kind of enduring relationship").

⁶⁴ *See Whitman*, 176 U.S. at 564.

⁶⁵ *Bernheimer*, 206 U.S. at 529 (enforcing the obligation in federal courts); *cf.* Wesley Newcomb Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285, 312–13 (1909) (characterizing the liability as quasi-contractual).

⁶⁶ *Bernheimer*, 206 U.S. at 532; *cf.* *Hawkins v. Glenn*, 131 U.S. 319, 329 (1889) ("A stockholder is so far an integral part of the corporation that, in the view of the law, he is privity to the proceedings touching the body of which he is a member."); *cf.* Wesley Newcomb Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 9 COLUM. L. REV. 492, 517 (1909) (providing examples where the *lex loci contractus* would govern liability of members of the organization as to third parties).

⁶⁷ *Converse v. Hamilton*, 224 U.S. 243, 261 (1912).

these cases went beyond simple judgment recognition, they did not apparently entail a more general requirement that states entertain the statutory actions of other states. Rather, the shareholder liability cases reflect the Court's concern to uphold contractual promises—a central concern of pre–New Deal conflict-of-laws jurisprudence as scholars have noted.⁶⁸ As Clyde Spillenger has stated, the Court saw contract enforcement as “a universal prerogative belonging to all individuals.”⁶⁹

As noted above, when state constitutions or statutes in force at the time a corporation was chartered provided for the liability of shareholders, the Court treated that liability to creditors as part of the contractual obligations of the charter. Accordingly, the Court indicated that an incorporating state legislature's attempt retroactively to abrogate such liability would violate the Contracts Clause.⁷⁰ Similarly, a forum state's refusal to entertain creditor or statutory assignee actions against forum-state domiciliaries for shareholder liability under the laws of an incorporating state could nullify the contractual obligations to creditors of the forum-domiciled shareholders. This was because, at that time, individual shareholders would generally have been amenable to service only in their state of domicile (the forum), and not in the incorporating state. But the Court could not easily characterize the forum's *judicial* abrogation of the contract (by denying jurisdiction) as violating the Contracts Clause, because that Clause only prohibited legislative impairments of contracts. The Court in the shareholder liability cases nevertheless eventually found a home for such concerns for contracts in the Full Faith and Credit Clause.⁷¹

⁶⁸ See generally Stern, *supra* note 63, at 1512, 1521 (emphasizing themes of freedom of contract, vested rights, and extraterritoriality in *Lochner*-era conflict-of-laws jurisprudence); Spillenger, *supra* note 32, at 3 (stating that early choice-of-law cases would have been seen as more about property or liberty of contract, or extraterritoriality, than conflict of laws).

⁶⁹ Spillenger, *supra* note 32, at 7 (stating that even after jurists saw tort liability as less universal “many continued to see the right to enforcement of a private contract as a universal prerogative belonging to all individuals (even if subject to reasonable local regulations), not simply a positive legal right held at the sufferance of the state”); see also WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE* 31 (2005) (suggesting that the Court came close to constitutionalizing what was then the traditional choice-of-law rule that, in contract cases, the law of the place of the making of the contract was to apply); Stern, *supra* note 63, at 1521 (discussing vested rights theories).

⁷⁰ See *Fourth Nat'l Bank v. Francklyn*, 120 U.S. 747, 755–56 (1887) (holding that state-of-incorporation requirements for suits against shareholders had to be met in a federal court in another state, and indicating that the modifications to those prerequisites did not annul that liability but only changed the remedies).

⁷¹ The Court used due process/liberty of contract and, to a lesser extent, full faith and credit in its choice-of-law cases. See *infra* text accompanying notes 81–90. See generally Stern, *supra* note 63, at 1548–49 (indicating that the Court saw its choice-of-law decisions as vindicating liberty of contract); Spillenger, *supra* note 32, at 3 (also emphasizing liberty of contract).

As discussed more fully in Parts IV and V, some modern conflicts scholars argue that states' duties to entertain other states' causes of action are grounded in a notion that states overall should advance the policy objectives of other states, to the extent not inconsistent with the forum's own legitimate policy objectives.⁷² They also argue that states have a duty not to discriminate against sister-state causes of action; if the forum courts take similar claims under their own law, they should be obliged to entertain sister-state claims.⁷³ But rather than being grounded in a requirement that the forum advance the particular public policy objectives of the state of incorporation,⁷⁴ the Supreme Court's insistence that states entertain shareholder liability actions advanced a policy of contract enforcement that transcended the policy of any specific state. And rather than being grounded in a prohibition on discrimination against sister-state claims, the decisions were grounded in individuals' substantive rights.

4. *Corporate Director Liability*

Further illustrating the strong contractual roots of shareholder liability suits was the different treatment of suits against officers and directors. Similar to the shareholder liability cases, the directors' liability suits involved the jurisdictional (door-closing) question. Some state laws provided that a corporate director or officer who failed to make required financial statements would be personally liable for corporate debts in the event of insolvency. In the course of giving a narrow construction to such a statute in a case brought in a federal court in the incorporating state,⁷⁵ the Supreme Court noted, with apparent approval, that sister states universally refused to enforce such directors' liabilities.⁷⁶ This was due to their "penal" nature—a traditional reason for refusal to enforce sister-state law—which distinguished them from the shareholder's contract-based liability.⁷⁷

⁷² See, e.g., BRILMAYER, *supra* note 8, § 3.1, at 131 (indicating that states join together to further their own domestic objectives); *id.* § 3.3.1, at 150–51 (indicating that the forum's interests are not unduly subordinated so long as the forum is only obliged to treat the judgment or cause of action the way it treats forum judgments and causes of action).

⁷³ *Id.* § 3.3.1, at 150–51; Kramer, *supra* note 9, at 1980–97 (discussing a nondiscrimination principle).

⁷⁴ See Spillenger, *supra* note 32, at 17 (arguing that the *lex loci contractus* rule was not based in "concern for the sovereign interests of the locus" so much as in the "common law's conception of contract as being private and consensual in nature").

⁷⁵ *Steam-Engine Co. v. Hubbard*, 101 U.S. 188, 191, 196 (1879).

⁷⁶ *Id.* at 192.

⁷⁷ See *id.*; *cf.* *Chase v. Curtis*, 113 U.S. 452, 458 (1885) (distinguishing shareholder liabilities as arising from contracts).

The Court eventually did require a state to enforce a sister-state *judgment* against a corporate director in *Huntington v. Attrill*,⁷⁸ where the Court reasoned that the particular action was insufficiently penal to escape judgment enforcement.⁷⁹ Yet even as it required a Maryland court to enforce a New York judgment, the Court indicated that there would have been no federal question for review if the attempt had been to force Maryland to hear the original cause of action: “If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision on such a question to be reviewed by this court.”⁸⁰ At least at the time of *Huntington*, therefore, the Court seemed to assume that there was nothing in the Constitution that compelled states to entertain sister-state causes of action, even though there was an obligation to enforce sister-state judgments.

5. *Mutual Benefit Societies and Insurance*

The relevance of contractual rights to the jurisdiction-forcing cases is supported by parallel developments in choice of law (as distinguished from jurisdictional obligations)—particularly in cases involving mutual benefit associations and insurance contracts.⁸¹ In several cases, the Court on direct review used due process and (to a lesser extent) full faith and credit to forbid a state from applying its own law, or to require it to apply another state’s law.⁸² Because our main concern is jurisdictional rather than choice-of-law obligations, we discuss these decisions only briefly.

A number of cases in which the Court required the use of sister-state law involved insurance—either obligations involving beneficial associations, which were effectively insurance societies, or involving other insurance contracts. For example, in *Supreme Council of Royal Arcanum v. Green*, the Court required the New York courts to apply the law of the chartering state,

⁷⁸ 146 U.S. 657, 686 (1892) (requiring a Maryland court to recognize, in an action for fraudulent transfer, a New York judgment for a director’s liability).

⁷⁹ *Id.* at 676–77.

⁸⁰ *Id.* at 683.

⁸¹ See Stern, *supra* note 63, at 1525–29 (discussing, *inter alia*, insurance and fraternal benefit cases); Spillenger, *supra* note 32, at 7, 38–56 (discussing insurance cases); *id.* at 47 n.117 (discussing fraternal benefit cases); see also WEINTRAUB, *supra* note 8, § 9.3A, at 697–700 (discussing the fraternal benefit association cases).

⁸² See Stern, *supra* note 63, at 1526 (indicating that due process was primarily a negative doctrine, telling a state that it could not apply its own law extraterritorially, while full faith and credit tended to tell the forum state whose law it had to apply in these cases).

Massachusetts, when a member contested a dues increase that a Massachusetts court had previously approved.⁸³ The Court relied on the doctrines developed in the shareholder liability cases (discussed above) in reasoning that the members had entered a voluntary agreement to be bound by the charter of the incorporating state, under which the dues increase had been approved.⁸⁴ And similar to the shareholder cases, the Court treated the issue as one of giving full faith and credit to the judgment as well as to the laws of the sister state.⁸⁵ In a later decision not involving a prior judgment, *Modern Woodmen of America v. Mixer*, the Court, in a brief opinion, relied on *Royal Arcanum* in holding that the forum could not increase the liabilities of the beneficial organization by accelerating the payment of death benefits for a missing member contrary to the charter and the law of the incorporating state.⁸⁶ Thus, the Court in *Modern Woodmen* quietly allowed full faith and credit to require application of sister-state law even in a setting where full faith and credit to judgments was not implicated.

While full faith and credit made an appearance in the beneficial association cases, the Court more frequently invoked due process as the source of the limit on a forum's ability to apply its own contract law in a way that altered what the Court saw as the bargain on which the parties agreed. For example, the Court held that a forum violated due process when it applied its own statute of limitations rather than the shorter contractual period provided in an insurance contract.⁸⁷ Using the longer limitations period "abrogates a contractual right and imposes liability, although the parties have agreed that there should be

⁸³ 237 U.S. 531, 535–37, 544–45 (1915).

⁸⁴ *Id.* at 543–44. Indeed, the Court treated the membership relationship as more than a contract. *See also* *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544, 551 (1925) ("The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting incorporation."); Comment, *Full Faith and Credit to Statutes*, 45 *YALE L.J.* 339, 346 (1935) (noting that the beneficial associations cases involved continuing relations that were statutory yet contractual); Stern, *supra* note 63, at 1528 (discussing these cases as involving status).

⁸⁵ *Royal Arcanum*, 237 U.S. at 544–45 (noting "how inseparably . . . the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that State"); *id.* at 545 ("[I]f the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized . . .").

⁸⁶ *Modern Woodmen*, 267 U.S. at 550–51 (holding that where the charter provided that death benefits for an insured who disappeared would only be paid at the end of the life expectancy under prescribed tables, the forum could not accelerate the payment upon the person's being missing for ten years).

⁸⁷ *See, e.g.*, *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408–09 (1930).

none.”⁸⁸ The Court reached such a result not only when the law governing the contract was that of a sister state, but also when the law was that of a foreign country⁸⁹—thus indicating that the Court’s concern was more about interparty contractual obligations and less about interstate obligations. The Court’s reliance on due process similarly underscored the underlying substantive nature of the forum’s obligation not to alter voluntary agreements.⁹⁰

In sum, on the eve of *Broderick v. Rosner*, the Court had held that forum states must entertain individual creditors’ actions authorized by the law of the corporation’s chartering state to collect against individual shareholders to enforce unsatisfied judgments against corporations. In addition, the state of incorporation’s statutory assignee, armed with a determination from the insolvency court approving a shareholder assessment, could sue shareholders in other states. Due to the initial decrees of the incorporating state courts, the creditor and statutory assignee cases simultaneously partook of full faith and credit to the judgments and also to the laws of the incorporating state. The importance of the notion of voluntary agreement to the shareholder liability actions was illustrated by the Court’s suggestions that forums would not need to entertain out-of-state causes of action for directors’ liability.⁹¹

⁸⁸ *Home Ins. Co.*, 281 U.S. at 406–07; *see also id.* at 408 (holding that an “attempt to impose a greater obligation than that agreed upon . . . violates the guaranty against deprivation of property without due process of law”); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 154–55, 162 (1914) (holding that the Missouri courts violated due process by applying Missouri law to loans made on an insurance contract that the Court treated as made in New York, and thus governed by New York law); *id.* at 160–61 (referring to extraterritoriality concerns, and to destruction of freedom of contract); *id.* at 161 (suggesting that such concerns had been part of full faith and credit decisions); *cf. N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 377 (1918) (holding that Missouri violated Fourteenth Amendment liberty of contract by applying its own law to avoid the effect of the policyholders’ later using the policy as security for a loan under New York law).

⁸⁹ *Home Ins. Co.*, 281 U.S. at 408. *But cf. Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154 (1932) (requiring a New Hampshire federal court to apply Vermont workers’ compensation law, but indicating there would not be an obligation to apply a foreign country’s law); Comment, *supra* note 84, at 346–47 (arguing that workers’ compensation cases were not contractual because many of the acts declare that the obligation is independent of contract).

⁹⁰ Due process also encompassed extraterritoriality concerns. *See Stern, supra* note 63, at 1526.

⁹¹ The Court also refused to require forum states to follow the law of the incorporating state as to disposition of insolvent corporations’ assets located within the forum state. *See, e.g., Clark v. Williard*, 294 U.S. 211, 213, 214 (1935) (“Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts.”); *see also Spillenger, supra* note 32, at 19 (noting that it was hard to argue that a creditor had “evidenc[ed] his ‘intention’ to be bound” by the bankruptcy proceeding in the debtor’s state).

B. Broderick v. Rosner

The Court's 1935 decision in *Broderick v. Rosner* served as the Supreme Court's principal precedent for its later decision in *Hughes v. Fetter* imposing a general duty on states to entertain causes of action under sister-state laws. *Broderick* had most of the elements of the statutory assignee suits against shareholders that the Court had previously required states to entertain. In the event of insolvency, New York law provided that shareholders of New York-chartered banks owed a liability up to the par value of their stock.⁹² New York law also provided that a statutory assignee, the New York Superintendent of Banks, would step into the shoes of the insolvent corporation.⁹³ In connection with the dissolution of a New York bank, the New York Superintendent sued New Jersey shareholders in New Jersey in an action at law to collect the assessments. The New Jersey courts determined that under New Jersey law, their common law courts lacked jurisdiction over such an action. And New Jersey equity courts apparently would have required joinder of all creditors and shareholders, which would not have been possible given the limitations on personal jurisdiction.⁹⁴

Broderick differed from the earlier shareholder liability decisions because there had been no prior judicial decree declaring the insolvency and authorizing the assessment against the stockholders. Rather, as provided by the New York statute, the Superintendent of Banks—in administrative rather than judicial proceedings—had determined the insolvency of the corporation and the necessity of the shareholder assessment.⁹⁵ Thus, full faith and credit to judgments was not readily available as an argument to compel the New Jersey courts to entertain the Superintendent's action.

In the Supreme Court, the Superintendent argued that the New York administrative decision should be as binding as a judicial decree.⁹⁶ If accepted by the Court, this argument would have meant the administrator's determination of insolvency and the need for the assessment would have to be recognized. Justice Brandeis's opinion for the Court declined to reach the issue of the preclusive effect of the administrative determination, but said that full

⁹² *Broderick v. Rosner*, 294 U.S. 629, 637 (1935).

⁹³ *Id.* at 641.

⁹⁴ *Id.* at 638–40.

⁹⁵ *Id.* at 644.

⁹⁶ *Id.* at 646.

faith and credit nevertheless required New Jersey to entertain the suit under New York law.⁹⁷

Many aspects of the opinion in *Broderick* aligned with the reasoning of the prior shareholder cases. The shareholders had assumed a liability “contractual in character.”⁹⁸ They had submitted themselves to the laws of New York for purposes of the assessment.⁹⁹ New Jersey could not have a policy “of enabling all residents of the State to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality.”¹⁰⁰ Moreover, it was unlikely that there existed alternative forums in which personal jurisdiction could be had over the New Jersey shareholders.¹⁰¹ On its facts and some of its reasoning, then, *Broderick* could be read as a relatively limited decision requiring states to enforce what the Court saw as incontestably valid contracts, the obligations of which were defined by statutes of other states.

On the other hand, some of the Court’s language suggested broader duties to entertain actions under the laws of sister states. The Court stated, “[T]he full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another State or has been conferred by its statutes. But the room left for the play of conflicting policies is a narrow one.”¹⁰² What is more, Justice Brandeis reasoned that the prior shareholder cases involved recognition of statutes as “public acts” within the meaning of the Full Faith and Credit Clause, although the cases had also relied on the fact that there had already been judicial proceedings under those statutes.¹⁰³ Brandeis claimed that full faith and credit to judgments was not the basis for the Court’s earlier decisions, because the out-of-state shareholders had not been personally served in the initial proceedings. Because of the lack of personal jurisdiction, as “[a]gainst the nonresident stockholders there had been

⁹⁷ *Id.* at 647; cf. Earl M. Maltz, *Larry Kramer, Same-Sex Marriage, and the Politics of Legal Scholarship*, 38 CREIGHTON L. REV. 533, 535 (2005) (indicating that Brandeis saw the Superintendent’s assessment as analogous to a judicial assessment).

⁹⁸ *Broderick*, 294 U.S. at 643.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 644.

¹⁰¹ Federal subject matter jurisdiction would not always have been available in such cases, particularly given amount-in-controversy requirements.

¹⁰² *Broderick*, 294 U.S. at 642 (internal citations omitted); see also *id.* at 643 (“For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity.”).

¹⁰³ *Id.* at 644 (citing *Converse v. Hamilton*, 224 U.S. 243, 252, 260 (1912)); see also *Converse*, 224 U.S. at 261 (“[T]he laws of Minnesota and the judicial proceedings in that State . . . were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States.”).

no judgment” to recognize under the Full Faith and Credit Clause—only public acts.¹⁰⁴ But Brandeis’s characterization of those decisions was misleading, because they had relied on the shareholders’ being legally bound by the initial judicial decrees, by virtue of their representation by the corporation.¹⁰⁵

Whether *Broderick* would come to stand for any broader obligation of states to entertain the actions of other states, or would remain a limited decision based on the special contractual features of the shareholder cases, remained open.¹⁰⁶ And in the years between *Broderick* and *Hughes*, courts generally failed to invoke *Broderick* to support a broader door-opening obligation.¹⁰⁷

III. PRELUDES TO *HUGHES V. FETTER*

Hughes was a wrongful death action, and in this Part (III) we discuss preludes to *Hughes* in wrongful death and other personal injury claims, as well as in battles over forum non conveniens. Personal injury actions differed from shareholder suits in that the plaintiff often could obtain personal jurisdiction over the defendant in multiple forums. Part III.A shows that the Court prior to *Hughes* had not required states to entertain wrongful death actions under the law of other states (Part III.A.1). And while the Court did occasionally require states that took jurisdiction of personal injury actions to apply sister-state law,

¹⁰⁴ *Broderick*, 294 U.S. at 644–45; see also Brief for Appellant at 69, *Broderick*, 294 U.S. 629 (No. 528) (arguing that the shareholder cases did not merely involve full faith and credit to judgments, for then the orders would have been invalid for lack of personal service).

¹⁰⁵ See, e.g., *Converse*, 224 U.S. at 260 (“The proceedings were had with adequate jurisdiction to make them binding upon the stockholders in the particulars before named.”).

¹⁰⁶ Contemporary commentary suggested that that the issue of the breadth of duties to apply statutes of other states remained open. Most commentary combined consideration of the choice-of-law and jurisdictional questions. See Maurice S. Culp, *Negotiability of Promissory Notes Payable in Specifics*, 9 Miss. L.J. 277, 288 n.45 (1937) (noting that the application of full faith and credit to statutes governing contracts was limited to receiverships, stockholder liability, fraternal insurance contracts, and workers’ compensation); Comment, *supra* note 84, at 351 (concluding in light of limiting decisions such as *Clark v. Williard*, 294 U.S. 211 (1935), that the “trend towards supplanting comity with compulsion is to be one of gradual, deliberate development”).

¹⁰⁷ Typical of the post-*Broderick* decisions were actions by out-of-state officials seeking to enforce assessments on in-state shareholders of insolvent out-of-state mutual insurance companies or banks. See, e.g., *Gaston v. Keehn*, 26 S.E.2d 107, 113 (Ga. Ct. App. 1943) (enforcing assessment on members of a mutual insurance company); *G.M.C. Hotels, Inc. v. Hanson*, 290 N.W. 615, 616–17 (Wis. 1940) (enforcing “double liability” on bank shareholders). Less typical (if not singular) was *Bowles v. Barde Steel Co.*, 164 P.2d 692, 699 (Or. 1945), in which the Oregon Supreme Court enlisted *Broderick* in support of its conclusion that its state courts must hear civil suits for penalties brought by federal officials against federal price control violators. Cf. *Testa v. Katt*, 330 U.S. 386, 389 (1947) (“It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws.”).

it quickly slackened any such requirements (Part III.A.2). Part III.B shows how the multiplicity of forums in which plaintiffs could bring personal injury cases led to an active debate about whether plaintiffs should be restricted in their forum choice. A bare majority of the Court eventually approved the doctrine of forum non conveniens.¹⁰⁸ Justice Black in dissent, however, favored wide-open plaintiff forum choice,¹⁰⁹ with later implications for jurisdictional obligations.

A. *Wrongful Death and Related Actions*

1. *Wrongful Death and Jurisdiction*

Broderick would be the Court's primary precedent for *Hughes v. Fetter*, in which the Court required Wisconsin to entertain an Illinois wrongful death action for a death occurring in Illinois.¹¹⁰ *Broderick*, however, provided only equivocal support for the result in *Hughes*. As noted above, a forum's refusal to entertain a shareholder action might effectively foreclose any remedy because personal jurisdiction could not easily be had against individual shareholders in the law-supplying state. By contrast, a forum's refusal to entertain a wrongful death action under the laws of a sister state would not foreclose relief because personal jurisdiction was generally available against the defendant in the law-supplying state, where the death or injury occurred.¹¹¹

To be sure, wrongful death actions bore some resemblance to stockholder suits. Both liabilities were statutory; the common law did not provide liability for death, just as it did not provide for individual liability of stockholders.¹¹² The statutory actions for wrongful death and stockholder liabilities nevertheless were both closely related to common law actions. The Court saw shareholder liability actions as suits on voluntary contracts, and it saw wrongful death actions as adding a remedy for what was concededly tortious conduct.¹¹³

¹⁰⁸ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512, 517 (1947).

¹⁰⁹ *Id.* at 515–16 (Black, J., dissenting).

¹¹⁰ See *Hughes v. Fetter*, 341 U.S. 609, 610, 613 (1951).

¹¹¹ It was also more likely that wrongful death suits would meet amount-in-controversy requirements for federal jurisdiction.

¹¹² *Dennick v. R.R. Co.*, 103 U.S. 11, 17, 21 (1880) (indicating that the wrongful death action was a right dependent solely on the state statute).

¹¹³ See, e.g., *Stewart v. Balt. & Ohio R.R.*, 168 U.S. 445, 448 (1897) (“A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona*, damages therefor could have been recovered in an action at common law.”).

Dennick v. Railroad Co. established that the federal courts were capable of hearing wrongful death actions that arose in states other than the one in which the court sat.¹¹⁴ This and later cases relied on the common law and transitory nature of the statutory liability,¹¹⁵ and distinguished instances of liability “for an act in itself not wrongful, in which a purely statutory delict is created.”¹¹⁶ The lower federal court’s acceptance of jurisdiction over such cases was essentially obligatory.¹¹⁷

The federal courts’ obligation to take such cases, however, did not imply a similar obligation on state courts.¹¹⁸ Thus the Supreme Court in *Chambers v. Baltimore & Ohio Railroad* rejected an attempt to force a state court to entertain an out-of-state wrongful death action.¹¹⁹ A Pennsylvania plaintiff sued in an Ohio state court to recover under the Pennsylvania wrongful death statute for the death of her Pennsylvania husband from injuries received in Pennsylvania.¹²⁰ The plaintiff claimed that the Privileges and Immunities Clause forbade the Ohio Supreme Court’s interpretation of an Ohio statute to the effect that Ohio courts could entertain wrongful death actions arising out of state and under the law of such other state only if the decedent were an Ohio citizen.¹²¹ The United States Supreme Court stated:

¹¹⁴ 103 U.S. at 12, 21 (reversing a New York federal court, and holding that it must entertain a New Jersey wrongful death action).

¹¹⁵ *Id.* at 18–19 (rejecting the argument that because the action arose from a statute, it was necessarily local rather than transitory); *Stewart*, 168 U.S. at 448 (concluding that the action was in the nature of tort and therefore transitory, and was remedial and not penal).

¹¹⁶ *Stewart*, 168 U.S. at 448; *cf.* *Atchison, Topeka & Santa Fe Ry. v. Nichols*, 264 U.S. 348, 351–52 (1924) (holding that a federal court in California properly awarded the \$5,000 “forfeiture” under New Mexico wrongful death law, because the amount was essentially reparative not punitive).

¹¹⁷ *See Stewart*, 168 U.S. at 450 (reversing the Court of Appeals for the District of Columbia, and stating “it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland”).

¹¹⁸ While the Court stated that it had endeavored to show that the contrary reasoning of some state cases was “not sound,” it also indicated that it was making a general law decision. *Dennick*, 103 U.S. at 21 (indicating that the Court would decide for itself, in “the absence of any controlling authority or general concurrence of decision”); *see also* *Tex. & Pac. Ry. v. Cox*, 145 U.S. 593, 605 (1892) (indicating it was unclear whether the Texas Supreme Court would have allowed such an action, but holding the federal court should entertain it as a matter of general law); *Paulson & Govern*, *supra* note 44, at 974–75 (discussing state cases declining to hear out-of-state wrongful death actions); *Spillenger*, *supra* note 32, at 29.

¹¹⁹ 207 U.S. 142, 151 (1907).

¹²⁰ *Id.* at 146–47.

¹²¹ *Id.* at 147–49. An Ohio statute provided that suits could be maintained in the state for death of an Ohio citizen in another state, and the Ohio Supreme Court interpreted the statute as excluding other actions for deaths outside of Ohio. *Id.* at 148. The U.S. Supreme Court reasoned that the Ohio law as interpreted did not discriminate with respect to the citizenship of the parties who brought suit (as distinguished from the decedent). *Id.* at 149–50.

[S]ubject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times.¹²²

The Court's statement in *Chambers*, moreover, did not seem to imply that the state had to have a strong policy reason to reject out-of-state causes of action. Rather, jurisdictional and procedural rules were part of the sovereign prerogatives of the states in constituting their courts, and required no special justification.

Cases in which the Supreme Court allowed forum states to ignore a law-supplying state's attempts to make its jurisdiction over certain claims exclusive were similarly grounded in the principle of the forum's jurisdictional autonomy. State legislatures sometimes provided that plaintiffs could pursue the state's wrongful death or workers' compensation actions only in the state's own courts.¹²³ When plaintiffs filed such actions in other states' courts, defendants argued that if the forum took jurisdiction, it would deny full faith and credit to the laws of the state that created the action and purported to make its jurisdiction over such actions exclusive.¹²⁴ The Court, however, upheld the ability of the forum to take jurisdiction if it chose to, repeating language like that used in *Chambers* about the forum's jurisdictional autonomy.¹²⁵ It followed that full faith and credit need not be given to a law-supplying state's statute calling for exclusive jurisdiction.

¹²² *Id.* at 148–49; *cf.* *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126, 128–29 (1904) (holding that a federal court could not have taken jurisdiction where Mexican liability for death was penal, and that it would be improper to use Texas law to provide a lump sum rather than periodic payments as called for under Mexican law).

¹²³ See Comment, *Forum Non Conveniens, a New Federal Doctrine*, 56 YALE L.J. 1234, 1236 (1947) (stating that there were many such statutes).

¹²⁴ See *Atchison, Topeka, & Santa Fe Ry. v. Sowers*, 213 U.S. 55, 60–62 (1909).

¹²⁵ *Id.* at 70 (quoting *St. Louis, Iron Mountain, & S. Ry. v. Taylor*, 210 U.S. 281, 285 (1908)); see also *Tenn. Coal, Iron & R.R. v. George*, 233 U.S. 354, 360 (1914) (reasoning that the forum's jurisdiction “is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action”). *But cf.* Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1149 (2011) (arguing that the nonhoarding cases are based on a principle that the hoarding state is not allowed to discriminate against sister-state jurisdiction).

2. *Personal Injury and Choice of Law*

Although prior to *Hughes* the Court never required states to take jurisdiction of other states' wrongful death actions, the Court eventually forbade courts that chose to take jurisdiction from applying forum law in place of sister-state law in certain circumstances. Similar to the fraternal benefit and insurance cases discussed in Part II, however, these decisions tended to involve parties who had entered voluntary agreements that, according to the Court, contemplated the application of a particular state's law. And even cases in which the Court required forum states, after taking jurisdiction, to apply another state's laws, the Court indicated that the forum did not necessarily have to take jurisdiction in the first place.

For example, the Court in *Bradford Electric Light Co. v. Clapper* required a federal court in New Hampshire, as a matter of the Full Faith and Credit Clause, to uphold the employer's defense that Vermont's workers' compensation law rather than New Hampshire's tort law applied.¹²⁶ Although the Court was reviewing a choice-of-law decision of a federal court, its reliance on the Full Faith and Credit Clause indicated that the decision encompassed state courts.¹²⁷ New Hampshire law allowed the employee to elect the common law remedy, which the Vermont law did not.¹²⁸ Both the employer and the employee were domiciled in Vermont and the employee only occasionally worked in New Hampshire, where the injury occurred.¹²⁹ The Court cited to the parties' having entered their contractual relations under the law of Vermont in ruling that the New Hampshire federal court had to apply Vermont law.¹³⁰ The Court, however, noted that "the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State."¹³¹ The Court gave examples where nonenforcement was

¹²⁶ 286 U.S. 145, 154, 159 (1932).

¹²⁷ See *id.* at 154–55. The Full Faith and Credit Clause by its terms, however, applies to states and not the federal government. U.S. CONST. art. IV, § 1.

¹²⁸ *Clapper*, 286 U.S. at 152–53, 159.

¹²⁹ *Id.* at 151.

¹³⁰ *Id.* at 152 (stating that Vermont law provided that, unless the parties otherwise contracted, their agreement would be presumed to contain an agreement that the Vermont law applied as to workers hired in state to work out of state); *id.* at 159 ("If . . . the employee or his representative were free to disregard the law of Vermont and his contract, the effectiveness of the Vermont Act would be gravely impaired."). But as Clyde Spillenger notes, Brandeis also may have wanted to move away from a rule of *lex loci contractus* by relying on a notion of status. See Spillenger, *supra* note 32, at 60–62.

¹³¹ *Clapper*, 286 U.S. at 160.

allowed, including where “the forum fails to provide a court with jurisdiction of the controversy,” citing *Chambers*.¹³²

Despite such limiting language, one might nevertheless suppose that the general trend favored more expansive state obligations to hear sister-state claims as a matter of full faith and credit. In *Clapper* as well as the beneficial association and insurance contract cases, the Court expanded duties to apply out-of-state law when the forum took jurisdiction. And three years after *Clapper*, the Court in *Broderick* forced a state to take jurisdiction of a shareholder liability action.¹³³ In addition, shortly after *Broderick*, the Court held that a state must recognize a tax judgment from another state, despite earlier precedents to the contrary.¹³⁴

But the trend was not unidirectional. The Court soon backed off any serious efforts to constrain state courts’ choice of law when the state courts took jurisdiction.¹³⁵ In *Pacific Employers Insurance Co. v. Industrial Accident Commission*, the Court allowed California to apply its own workers’ compensation law although the facts resembled those of *Clapper* in which the Court had rejected use of forum law.¹³⁶ As in *Clapper*, the employee regularly worked in the employer’s home state (Massachusetts), but was injured while on temporary assignment in the forum (California).¹³⁷ The Court did not attempt to determine which state had the stronger claim to apply its laws, as it had in another decision just five years before.¹³⁸ Rather, the forum state could legitimately prefer its own statutes:

[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith

¹³² *Id.* (citing *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148, 149 (1907)); *see also id.* (“A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff’s substantive right, so that he is free to enforce it elsewhere.”); *id.* at 156 (indicating that Vermont “has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders and likewise has power to exclude from its own courts proceedings for any other form of relief for such injuries” (citation omitted)).

¹³³ *Broderick v. Rosner*, 294 U.S. 629, 647 (1935).

¹³⁴ *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 278–79 (1935); *see also Fauntleroy v. Lum*, 210 U.S. 230, 233, 237 (1908) (not allowing a public policy objection to a judgment on a futures contract).

¹³⁵ *See generally* Spillenger, *supra* note 32, at 56–67 (discussing the workers’ compensation cases as moving toward a recognition that more than one state had an interest in applying its laws).

¹³⁶ 306 U.S. 493, 504–05 (1939).

¹³⁷ *Id.* at 497–98.

¹³⁸ *See Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 549–50 (1934) (stating that California’s interests were “greater” than Alaska’s, and that the interest of Alaska “[was] not shown to be superior to that of California”).

and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.¹³⁹

Thus, full faith and credit decisions were not necessarily heading in the direction of greater forum-state obligations to enforce the public acts of sister states.

B. The Battle over Plaintiff Forum Choice and the Development of Forum Non Conveniens

As noted above, the Court continued to uphold state jurisdictional autonomy (i.e., door closing) in personal injury actions into the 1930s. There were, moreover, other reasons not to expect that the jurisdictional obligation in shareholder liability actions such as *Broderick* would carry over to wrongful death cases, such as *Hughes*. In the shareholder liability suits, as noted in Part II, the defendant shareholders' home state was generally the only forum in which the plaintiff could have obtained personal jurisdiction over the shareholders to enforce the contractual obligation. Personal jurisdiction would not have been available in the law-supplying state—that is, the state of incorporation. By contrast, in wrongful death cases, personal jurisdiction over the defendant usually existed in the law-supplying state—that is, where the death or injury occurred. Railroads were the predominant defendants in early wrongful death cases, and would easily be subject to jurisdiction where a railroad accident occurred even under premodern, restrictive rules of personal jurisdiction.¹⁴⁰ And individual defendants could, by 1927, be subject to personal jurisdiction for automobile accidents in the state of the occurrence.¹⁴¹

The problem in personal injury actions, at least according to many state and federal courts, was that plaintiffs had too many forum choices, thus leading to

¹³⁹ *Pac. Emp'rs Ins.*, 306 U.S. at 501; see also *Allstate Ins. Co. v. Hague* v. 449 U.S. 302, 312–13 (1981) (taking a similarly deferential approach to state choice of law); *Alaska Packers*, 294 U.S. at 547 (1934) (“*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted.”); *id.* at 543 (seeing right to contract as of less moment); Comment, *supra* note 84, at 348 (noting the Court’s unwillingness after *Alaska Packers* to hold that the law of the place of injury or of the contract would always govern, and that—given the possibility of swamping the Court—the Court would proceed cautiously in requiring states to give full faith and credit to sister-state statutes).

¹⁴⁰ *Cf. Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 408 (1855) (holding that Ohio could condition an out-of-state insurance company’s sale of insurance in Ohio on appointment of an agent for service as to disputes arising from contracts of insurance on property in the state); EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 181 (1992) (indicating that, by 1910, virtually all states required consent to jurisdiction as a condition of doing business in the state).

¹⁴¹ See, e.g., *Hess v. Pawloski*, 274 U.S. 352 (1927).

significant judicial and scholarly attention on the doctrine of forum non conveniens.¹⁴² For example, plaintiffs' attorneys notoriously perceived New York jury verdicts (whether in state or federal court) as higher than those of other states.¹⁴³ They accordingly brought actions arising in other states in New York courts under New York's long-arm statute, which reached corporations "doing business" in New York.¹⁴⁴ New York state courts, however, used judge-made doctrines of forum non conveniens to limit this practice¹⁴⁵—a form of state control over its own jurisdiction that tended to exclude causes of action brought under the laws of other states. Moreover, the U.S. Supreme Court allowed the New York state courts to dismiss a Federal Employers' Liability Act (FELA) suit between two Connecticut citizens on forum non conveniens grounds in *Douglas v. New York, New Haven & Hartford Railroad*,¹⁴⁶ despite having previously imposed a general duty on state courts to hear FELA actions.¹⁴⁷ Justice Holmes wrote for the *Douglas* majority: "There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking

¹⁴² See, e.g., Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12, 14 (1949) (noting that in the past, the plaintiff had almost no freedom in choosing where to sue, but that plaintiffs were now largely free of a rigid venue system); Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 418–19 (1955) (noting that FELA cases "undoubtedly constituted the most pressing evil" leading to later legislation allowing transfer between federal courts). See generally PURCELL, *supra* note 140, at 177–99 (discussing the rise of interstate forum shopping in the 1930s and '40s). In addition, the Court used the Commerce Clause to restrict plaintiff forum choices in several cases. See, e.g., *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312, 313–14, 317 (1923) (holding that subjecting a railroad corporation to suit based on its having an agent in the state, in which neither party resided, and when the cause of action arose elsewhere, unconstitutionally burdened interstate commerce); see also Comment, *supra* note 123, at 1238–39 (discussing *Davis* and other Commerce Clause cases and concluding that the Commerce Clause doctrine "approach[ed] the doctrine of *forum non conveniens*").

¹⁴³ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 510 (1947) (noting that the plaintiff had argued for retaining the New York forum because a claim for close to \$400,000 would "stagger the imagination" of a Lynchburg, Virginia, jury); PURCELL, *supra* note 140, at 187 (noting during the 1930s and '40s, New York, California, Illinois, and Minnesota were "importing centers" of litigation); Note, *The Effects of "Full Faith and Credit" and "Erie" on State Refusals to Entertain Foreign Statutory Claims*, 61 YALE L.J. 1206, 1211 n.36 (1952) (discussing Chicago's attraction for cases due to desire for an urban jury and noting that the desire for an urban jury led to a preference for state over federal courts in some FELA cases, because federal courts drew from larger areas that included rural jurors).

¹⁴⁴ See Comment, *Discretionary Exercise of Jurisdiction of Suits Between Non-resident Parties in New York*, 37 YALE L.J. 983, 986 (1928) (indicating that prior to 1913, New York law provided that "a foreign corporation could not be sued by a non-resident unless the cause of action arose" in New York or the subject matter was in New York, but that a 1913 amendment allowed suit by nonresidents when the corporation "'is doing business in the state'").

¹⁴⁵ *Id.* at 986–87.

¹⁴⁶ 279 U.S. 377, 385, 387–88 (1929).

¹⁴⁷ See *Mondou v. N.Y., New Haven & Hartford R.R.*, 223 U.S. 1, 59 (1912).

it is they who pay for maintaining the Courts concerned.”¹⁴⁸ The Court, moreover, subsequently approved federal courts’ general use of forum non conveniens in *Gulf Oil v. Gilbert*¹⁴⁹ and *Koster v. Lumberman’s Mutual Casualty Co.*¹⁵⁰ Forum non conveniens, of course, is a form of door closing, yet it was one with which the Court seemed comfortable.

As indicated by the 5–4 splits in *Gilbert* and *Koster*, however, some justices saw the plaintiff as having a right to sue wherever she satisfied personal jurisdiction and venue, and the dissenting judges would have rejected dismissal on forum non conveniens grounds.¹⁵¹ Prior to *Gilbert* and *Koster*, those justices favoring broad plaintiff forum choice had garnered a majority in *Baltimore & Ohio Railroad v. Kepner*.¹⁵² The *Kepner* Court held that the FELA’s special venue provisions, allowing venue, *inter alia*, where “the defendant shall be doing business at the time of commencing [the] action” implicitly prohibited use of forum non conveniens in the federal courts so long as the FELA’s statutory venue provisions were satisfied.¹⁵³ “[R]easons of convenience or expense,” reasoned the Court, should not frustrate the “privilege of venue.”¹⁵⁴ When the pro–forum non conveniens justices later won majorities in *Gilbert* and *Koster*, Justice Black in dissent echoed themes from *Kepner*, stating, “Neither the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction.”¹⁵⁵

¹⁴⁸ *Douglas*, 279 U.S. at 387. *But cf.* PETER HAY ET AL., CONFLICT OF LAWS 343 (5th ed. 2010) (indicating it may no longer be an adequate justification to deny jurisdiction on the ground that noncitizens do not pay for the court system).

¹⁴⁹ 330 U.S. 501, 512 (1947).

¹⁵⁰ 330 U.S. 518, 531–32 (1947).

¹⁵¹ *See, e.g.*, Bickel, *supra* note 142, at 12–19 (discussing the differing positions of Black and Frankfurter).

¹⁵² 314 U.S. 44, 53–54 (1941).

¹⁵³ *See id.* at 49, 52–54 (internal quotation mark omitted). The special provision had superseded the use of the general federal-question venue provisions that only provided venue where the defendant was an inhabitant. *Id.* at 49 (citing Employers’ Liability Act of April 22, 1908, 35 Stat. 65).

¹⁵⁴ *Id.* at 54. Justice Frankfurter, in dissent, argued that other special venue provisions had been read as allowing for forum non conveniens, and that the expansion of venue was not intended “to give a plaintiff an absolute and unqualified right to compel trial of his action in any of the specified places he chooses.” *Id.* at 56–57 (Frankfurter, J., dissenting); *see also* *Miles v. Ill. Cent. R.R.*, 315 U.S. 698, 702 (1942) (prohibiting a state court from enjoining a citizen from pursuing an FELA action in another state court, relying on the language of the statute that removal to federal court was not allowed); *cf.* *United States v. Nat’l City Lines, Inc.*, 334 U.S. 573, 574–75, 596–97 (1948) (holding that forum non conveniens could not be used given the Clayton Act’s particular venue provisions).

¹⁵⁵ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 513 (1947) (Black, J., dissenting).

Justice Black's view that the exercise of federal jurisdiction was mandatory, however, contrasted markedly with his support for federal court abstention in favor of state court jurisdiction. It was Black who authored *Burford v. Sun Oil Co.*, in which the Court held that the federal courts should abstain from exercising their diversity and federal question jurisdiction when an oil company sought to enjoin a Texas administrative ruling that the company claimed violated state law and federal due process by overallocating drilling rights to smaller producers.¹⁵⁶ Black's inconsistency was not lost on the majority that approved *forum non conveniens* in *Gilbert* and *Koster*. Justice Jackson, writing for the majority in *Gilbert*, observed that in *Burford* the Court declined to exercise jurisdiction "[o]n substantially *forum non conveniens* grounds."¹⁵⁷

Black responded in his *Gilbert* dissent that abstention was appropriate for cases in admiralty and equity, but not for actions seeking money damages such as *Gilbert*.¹⁵⁸ He had more explaining to do in *Koster*, in which he argued in dissent that the federal courts should not use *forum non conveniens* in an equity derivative action. Black explained that abstention was generally inappropriate where, as in *Koster*, the equitable remedies were sought *against* a multistate corporation.¹⁵⁹ This presumably served to distinguish *Burford*, where a multistate corporation was the plaintiff seeking equitable relief in federal court.¹⁶⁰

Justice Black lost the campaign against *forum non conveniens* in 1948, when Congress statutorily authorized transfer between federal district courts based on essentially *forum non conveniens* grounds.¹⁶¹ Congress thereby

¹⁵⁶ 319 U.S. 315, 316–17, 332–34 (1943).

¹⁵⁷ *Gilbert*, 330 U.S. at 505; see also Comment, *supra* note 123, at 1244–45 (treating abstention as a form of *forum non conveniens*).

¹⁵⁸ *Gilbert*, 330 U.S. at 513–14 (Black, J., dissenting); *id.* at 515 (“No such discretionary authority to decline to decide a case, however, has, before today, been vested in federal courts in actions for money judgments deriving from statutes or the common law.”).

¹⁵⁹ *Koster*, 330 U.S. at 532–33 (Black, J., dissenting) (stating, “There may be rare instances in which a federal court could decline to provide an equitable remedy against multi-state corporate defendants,” but indicating that shareholder suits should not generally be subject to *forum non conveniens*); *cf.* *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 323–24 (1945) (Black, J., concurring) (objecting to the minimum contacts approach to personal jurisdiction because “the Federal Constitution leaves to each State, without any ‘ifs’ or ‘buts,’ a power to . . . open the doors of its courts for its citizens to sue corporations whose agents do business in those States”).

¹⁶⁰ *Cf. Gilbert*, 330 U.S. at 512 (Black, J., dissenting) (“The defendant corporation is organized under the laws of Pennsylvania, but is qualified to do business and maintains an office in New York [where suit was brought]. Plaintiff is an individual residing and doing business in Virginia.”).

¹⁶¹ Act of June 25, 1948, ch. 626, 62 Stat. 937 (codified as amended at 28 U.S.C. § 1404(a) (2012)).

approved the result in *Gilbert* and *Koster* and disapproved the result in *Kepner*, which had held forum non conveniens unavailable in FELA cases.¹⁶² Yet for Black, other avenues would remain open to vindicate plaintiffs' forum choice, and that is where *Hughes v. Fetter* comes in.

IV. HUGHES V. FETTER AND ITS RATIONALES

A. *The Court's Opinion*

Hughes v. Fetter was a wrongful death action brought in the Wisconsin state courts, over a death that had occurred in an Illinois automobile accident.¹⁶³ All parties to the suit were Wisconsin residents.¹⁶⁴ Wisconsin had a wrongful death statute, but only "for a death caused in this state."¹⁶⁵ The plaintiff's action was therefore based on the Illinois wrongful death statute that was limited to deaths occurring in Illinois.¹⁶⁶ The Wisconsin trial court dismissed the action and the state supreme court affirmed.¹⁶⁷ The Wisconsin Supreme Court relied, *inter alia*, on *Chambers v. Baltimore & Ohio Railroad* (discussed in Part III.A.1), in which the U.S. Supreme Court rejected a Privileges and Immunities Clause challenge to a state refusal to entertain an out-of-state wrongful death action.¹⁶⁸ While noting that the Wisconsin courts

¹⁶² Bickel, *supra* note 142, at 15–16 & n.21 (noting that the 1948 Revisers said that *Kepner* showed the need for such a provision).

¹⁶³ 341 U.S. 609, 610 (1951).

¹⁶⁴ *Id.* at 613.

¹⁶⁵ *Id.* at 610 & n.2 (quoting Wis. Stat. § 331.03 (1949)) (internal quotation mark omitted).

¹⁶⁶ *Id.* at 614 (Frankfurter, J., dissenting).

¹⁶⁷ *Hughes v. Fetter*, 42 N.W.2d 452, 453, 456 (Wis. 1950), *rev'd*, 341 U.S. 609; *see also Hughes*, 341 U.S. at 610. Although the trial court's dismissal was on "on the merits," *see id.*, the dismissal was essentially jurisdictional and did not necessarily indicate that the plaintiff could not refile the action in Illinois. *See Hughes*, 42 N.W.2d at 456 (affirming the trial court's dismissal by stating, "[t]he defendants' motion for summary judgment dismissing the plaintiff's complaint was properly granted," but not indicating that the dismissal was "on the merits"); WEINTRAUB, *supra* note 8, at 708 n.244 (stating that the Wisconsin court's dismissal "was intended only to bar further suit in Wisconsin"); Kramer, *supra* note 9, at 1982 (noting that Black's opinion did not rely on the merits dismissal). Some scholars, however, treat the dismissal on the merits as central to the Court's decision. *See, e.g.,* CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 181 (2010) (indicating that the real problem with *Hughes* was the merits dismissal); Jordan, *supra* note 8, at 1803–05 (arguing that the merits dismissal should be seen as central to *Hughes*'s result, because the resulting judgment "creates a virtually insurmountable barrier to vindicating the claim"); Borchers, *supra* note 8, at 168 (seeing *Hughes* as presenting a possible equal protection violation because the case was a total loss for the plaintiff). The Court's later application of *Hughes* to reverse a jurisdictional dismissal in *First National Bank v. United Air Lines, Inc.*, 342 U.S. 396, 397–98 (1952), provides evidence that *Hughes* was not based on the "merits" dismissal.

¹⁶⁸ *See Hughes*, 42 N.W.2d at 453–54; *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 146–48, 151 (1907).

would ordinarily give comity to claims arising under sister-state law, they would not do so when it was against the public policy of the state.¹⁶⁹ The Wisconsin Supreme Court concluded that the territorial limitation in Wisconsin's wrongful death action expressed a state policy not to entertain wrongful death actions arising in sister states, under sister-state law.¹⁷⁰ In a 5–4 opinion by Justice Black, the Supreme Court reversed the Wisconsin judgment, and held that the Full Faith and Credit Clause required Wisconsin to entertain the Illinois statutory cause of action.¹⁷¹

The case obviously vindicated the plaintiff's forum choice. But constructing an argument that the Constitution or federal law required states to honor the plaintiff's forum choice faced several difficulties. Among those was the Court's past approval of state courts' use of the doctrine of forum non conveniens even as to federal claims, as well as the Court's and Congress's more recent authorization of federal courts' general use of that doctrine. Perhaps for this reason, Justice Black did not rely on a plaintiff forum choice rationale in *Hughes*.

In addition, Black explicitly rejected a characterization of the case as involving “a conflict between the public policies of two or more states”¹⁷²—a characterization that the Court sometimes used in horizontal choice-of-law cases.¹⁷³ Such a characterization would have made it hard to insist that Wisconsin entertain the action, given that the Court had moved in the direction of allowing forum states leeway to prefer their own policies over conflicting out-of-state policies in choice-of-law cases such as *Pacific Employers*.¹⁷⁴ Rather, Black recharacterized the conflict as one pitting national policy against parochial preferences:

¹⁶⁹ *Hughes*, 42 N.W.2d at 454.

¹⁷⁰ *See id.* at 453–56.

¹⁷¹ *Hughes*, 341 U.S. at 611 n.6, 613–14 (indicating that reliance on *Chambers* was “misplaced” because no full faith and credit problem was raised).

¹⁷² *Id.* at 611–12.

¹⁷³ *See, e.g.*, *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939); *see also* *Alaska Packers Ass'n. v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935) (stating that “where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent”).

¹⁷⁴ *See Hughes*, 341 U.S. at 620 (Frankfurter, J. dissenting) (“There is no support, either in reason or in the cases, for holding that this Court is to make a *de novo* choice between the policies underlying the laws of Wisconsin and Illinois.”); *see also* Note, *supra* note 143, at 1207 & n.7 (treating *Alaska Packers* as suggesting a balancing approach between the interests of sister states, but noting that, in *Hughes*, the Court balanced the state interest against the national interest).

On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states; on the other is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.¹⁷⁵

By stating the competing interests the way he did, it was almost inevitable that Black would conclude that “Wisconsin’s policy must give way.”¹⁷⁶

Much of the rest of the Court’s one-paragraph rationale was spent quarreling with the Wisconsin Supreme Court’s finding that the state actually had a policy against hearing a claim like the one before it. For example, Justice Black denied that the state was antagonistic to wrongful death claims “in general,” because it heard wrongful death claims under Wisconsin law.¹⁷⁷ In addition, although the Court was prepared to “assume” that doctrines such as forum non conveniens might provide a valid excuse for declining to hear a claim arising under a sister-state law, it denied that the Wisconsin Supreme Court could validly have dismissed the action on forum non conveniens grounds, because all the parties were Wisconsin citizens.¹⁷⁸

B. The “Maximum Enforcement” Rationale

The core of the *Hughes* decision was the supposed national policy of “looking toward maximum enforcement in each state of the obligations or

¹⁷⁵ *Hughes*, 341 U.S. at 612 (majority opinion) (footnote omitted).

¹⁷⁶ *Id.* For some scholarly criticisms of *Hughes*, see *supra* note 8.

¹⁷⁷ *Hughes*, 341 U.S. at 612. Justice Black also cited to an ALR article surveying state-law public policy objections to hearing sister-state claims, and suggested that possible differences between the two states’ wrongful death statutes regarding “maximum recovery and disposition of the proceeds of suit” were “generally considered [as] unimportant” when states decided whether to entertain other states’ wrongful death actions. *Id.* at 612 n.11.

¹⁷⁸ *Id.* at 612–13. The Court added that “in other cases” Wisconsin might be the only state in which jurisdiction could be had over all of the defendants in an out-of-state wrongful death claim. *Id.* at 613 (stating it was “relevant, although not crucial here,” that Wisconsin might be “the only jurisdiction in which service could be had as an original matter on the insurance company defendant”). That personal jurisdiction difficulties were not Justice Black’s central concern, however, was indicated by his later opinion for the Court in *First National Bank v. United Airlines, Inc.*, 342 U.S. 396 (1952). There the Court invalidated an Illinois law excluding out-of-state wrongful death claims, despite the statutory provision to ensure that a forum was available in the state of the death. *Id.* at 397–98. Justice Black stated, “The reasons supporting our invalidation of Wisconsin’s statute [in *Hughes*] apply with equal force to that of Illinois. . . . Nor is it crucial here that Illinois only excludes cases that can be tried in other states.” *Id.* at 398; see also WEINTRAUB, *supra* note 8, at 709 n.246 (citing *First National Bank* as indicating that the reversal in *Hughes* was not based on personal jurisdiction problems).

rights created or recognized by the statutes of sister states.”¹⁷⁹ This rationale seemingly conforms to what many modern conflict-of-laws scholars consider to be the aim of choice-of-law and full faith and credit rules: maximizing all states’ policies to the maximum extent.¹⁸⁰ Prominent conflict-of-laws scholars, therefore, have agreed with *Hughes* and its maximum enforcement rationale.¹⁸¹

1. “Grand Bargain” Methodology

Assuming one takes as a given that conflicts principles should maximize all states’ policies to the maximum extent, how does one determine whether a particular rule or practice produces such a maximizing result, particularly given that maximizing one state’s policies may trench on other states’ policies? A number of contemporary scholars have argued that the maximum enforcement policy requires imagining what states would agree to if they could overcome collective action problems.¹⁸² This technique derives from William Baxter’s proposals for resolving choice-of-law issues by such imaginary bargains. Baxter’s methodology in choice-of-law decisions requires a court to determine which state’s policies would suffer greater impairment if the other state’s law were to apply, and it assumes that the states would agree to results leading to less overall impairment of state policies.¹⁸³ While scholars have critiqued aspects of Baxter’s methodology—particularly the use of comparative impairment of different states’ policies in case-by-case choice of

¹⁷⁹ 341 U.S. at 612.

¹⁸⁰ See BRILMAYER, *supra* note 8, § 3.1, at 132 (stating that states “put judicial resources at the disposal of the interstate system as a whole, anticipating that by pooling their efforts, all states stand better chances of furthering their own domestic priorities”); *id.* § 4, at 174 (indicating that choice of law should aim “to maximize all of the objectives that states have chosen for themselves”); Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2145 (1991) (“To maximize state policies, we must determine which cases states care about and arrange tradeoffs to secure the application of each state’s law in as many of these as possible. . . . Maximizing the interests of different states can be done only on a more wholesale basis: by identifying generally shared policies or policy preferences and constructing rules that systematically advance these.”).

¹⁸¹ See Brilmayer & Underhill, *supra* note 9, at 836 (citing to the “maximum enforcement” rationale of *Hughes* as the aim of the Full Faith and Credit Clause, so as generally to require enforcement of other states’ claims, with exceptions such for valid public policy objections); Kramer, *supra* note 9, at 1983 (citing with approval the maximum enforcement rationale of *Hughes*).

¹⁸² See, e.g., Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 280 (1990) (stating that the theoretical framework for the choice-of-law canons he recommends “is a constructive multistate choice of law compact—the kind of agreement states would probably make if they were to negotiate”).

¹⁸³ William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 7–11 (1963); *cf.* William H. Allen & Erin A. O’Hara, *Second Generation Law and Economics of Conflicts of Laws: Baxter’s Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1014–15 (1999) (noting that Baxter sought a law and economics approach that would maximize states’ substantive policies, and might now favor the *First Restatement* approach as the best way to achieve that goal).

law¹⁸⁴—they have been more accepting of the imagined-bargain technique for generating general legislative-style proposals for multistate conflicts.¹⁸⁵ This Article addresses certain scholars' use of this grand bargain analysis and also uses such analysis itself at various points to critique *Hughes*.

Larry Kramer apparently relies on such a hypothetical multistate agreement as support for *Hughes*'s requirement that states entertain other states' causes of action.¹⁸⁶ He asks his readers to “[i]magine a world in which courts could not apply any law but their own.”¹⁸⁷ The conclusion seems to follow that states overall would agree to a general open-door rule, because allowing their own actions to be brought in other state courts would forward their own substantive policies. And presumably, the benefits of advancing their own substantive interests in the courts of other states would outweigh the cost of having to open their doors to other states' causes of action.

The scenario of states' not enforcing any law of other states certainly seems unattractive. Even if one puts aside choice-of-law issues when a state takes jurisdiction of a sister-state cause of action, and looks only to a world in which states never take jurisdiction of each others' causes of action, Kramer's all-or-

¹⁸⁴ See, e.g., BRILMAYER, *supra* note 8, § 4, at 171–72 (“To be able to derive any concrete results one has to make assumptions about the interests that the parties to the bargain would like to achieve, how strongly they hold these interests, and how willing they would be to bargain the interests away.”); Allen & O’Hara, *supra* note 183, at 1030–31 (doubting that Baxter’s analysis could predictably be applied case-by-case); Kramer, *supra* note 182, at 316–18 (discussing problems with comparative impairment analysis in many choice-of-law situations).

¹⁸⁵ See Kramer, *supra* note 182, at 315–18 (using Baxter’s multistate bargain notion to help derive general conflicts principles); cf. BRILMAYER, *supra* note 8, at § 4.5.2, at 212–13 (suggesting that Baxter’s approach could be usefully employed when non-adjudicators draft choice-of-law rules); Allen & O’Hara, *supra* note 183, at 1046 (arguing that given problems with a case-by-case Baxter approach, Baxter’s insights could lead to reviving a modified *First Restatement* approach).

¹⁸⁶ See Kramer, *supra* note 9, at 1987 (“Conflict of laws is, in essence, a system to enable courts from different jurisdictions to help each other enforce their respective laws.”). In the article, Kramer footnotes arguments he has “developed at greater length elsewhere” including in, *inter alia*, *Rethinking Choice of Law*, *supra* note 182, at 311–44, in which he employs hypothetical bargain analysis. See Kramer, *supra* note 9, at 1987 n.93. Kramer also uses the Full Faith and Credit Clause to help generate a nondiscrimination rule for a state’s treatment of a sister-state’s law. See *id.* at 1983.

¹⁸⁷ Kramer, *supra* note 9, at 1987. Kramer uses this argument not specifically to support *Hughes* but as support for his general nondiscrimination principle that he derives in part from *Hughes*. *Id.* at 1983–84; cf. Brilmayer & Underhill, *supra* note 9, at 830 (arguing that the equal access requirement of cases such as *Hughes* is “a rule of necessity in American federalism” because absent such a rule, “coequal and lesser sovereigns could completely ignore the laws of their partners and superiors”).

nothing scenario seemingly casts *Hughes* in a favorable light.¹⁸⁸ But as discussed below, the all-or-nothing comparison may be unwarranted.

2. *Problems with the Grand Bargain*

When the Framers drafted the Constitution, they presumably considered states' mutual interests. But as discussed in Part I, they did not agree to or even seem to contemplate that the Full Faith and Credit Clause would require them to take jurisdiction of other states' causes of action (or perhaps even to apply sister-state law). Nor did the course of the Court's treatment of statutory claims—up to and even arguably past *Broderick*—justify a pervasive constitutional obligation to entertain claims under the law of other states. Rather, it was only with *Hughes* that the Court held that the Full Faith and Credit Clause imposed such a general duty.

Given the late arrival of *Hughes* and the Court's prior reliance on comity rather than constitutional compulsion, perhaps the proper comparison with the *Hughes* regime is not “a world in which courts could not”¹⁸⁹ take jurisdiction of other states' causes of action. Rather, the appropriate comparison would be the world as it existed at the time of *Hughes* (and as it would exist without *Hughes*). In that world, the states employed nonconstitutionally compelled doctrines of comity in deciding whether to entertain sister-state claims—just as they had done from the founding era. And in typical cases in which a forum state was likely to close its doors, personal jurisdiction would be available in the state where the cause of action arose. The question then becomes: Does the full faith and credit obligation to entertain other states' causes of action maximize state policies better than the nonconstitutional regime of comity that preexisted it? Using this framework, it is not at all clear that the imagined multistate bargain would lead to the *Hughes* result.

a. *Incentives to Entertain Sister-State Actions Under a Comity Regime*

In the hypothetical bargain, states know that they are potentially both law-supplying states and forum states (for causes of action supplied by other states). We first consider what bargain states would make for cases like *Hughes* in which personal jurisdiction is available over the defendant in the

¹⁸⁸ Federal courts, however, could fill in some of the gaps by following, as they did in the past, their own jurisdictional obligation rules. See *supra* notes 54, 59.

¹⁸⁹ Kramer, *supra* note 9, at 1987.

law-supplying state.¹⁹⁰ (The infrequent cases in which personal jurisdiction over the defendant cannot be had in the law-supplying state pose different problems, and we discuss them separately below.)

States would probably surmise that, even without any constitutional compulsion, they have ample incentives to provide a forum for run-of-the-mill sister-state claims.¹⁹¹ The desire to obtain reciprocal treatment when they are the law-supplying state rather than the forum is one reason, but not the only one. In addition, states, as forums, may want to give plaintiffs or defendants who are residents the advantages of a home forum, and perhaps even to provide work for in-state attorneys.¹⁹²

b. Reasons Why Forums May Wish Not to Entertain Some Sister-State Actions

States as forums may also have reasons to close their doors to other states' causes of action—an option that *Hughes* narrows.¹⁹³ States appropriately see one of the primary institutional roles of their courts as expounding and applying their own state's law; state courts lack this important policymaking role with respect to other states' law. States therefore may wish to focus judicial resources on claims arising under their own laws.

Out-of-state claims not only provide fewer benefits in terms of supplying decisions on in-state law, but they also bring added costs. The forum will have to apply out-of-state substantive law and perhaps consider adjusting local

¹⁹⁰ See Jordan, *supra* note 8, at 1792–93 (arguing that the narrower availability of personal jurisdiction was a reason for requiring states to hear the claims of other states, but that the nondiscrimination rule should be reconsidered in light of expanded personal jurisdiction); *id.* at 1812 (indicating that the interpretation of the Full Faith and Credit Clause should be updated to reflect “contemporary realities”).

¹⁹¹ Cf. Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1026–27 (1991) (indicating that states generally have incentives to cooperate, and thus have been reluctant to adopt a straight forum-preference rule for true conflicts); Kramer, *supra* note 182, at 314 (indicating that even narrowly self-interested states would apply the law of other states in true conflicts to invite reciprocal treatment). *But cf.* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1177 (2000) (arguing that Kramer did not take into account the practical problems of implementing reciprocity, particularly in light of states' incentives to favor local litigants and the inability to sanction defection).

¹⁹² In addition, states have an interest in furthering justice, and may be loath to deny jurisdiction if it is unclear whether the plaintiff can obtain jurisdiction over the defendant in the law-supplying state. This is particularly true where the plaintiff asserts widely accepted rights of tort, property, and contract. *See, e.g.*, *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396, 397 (1952) (involving an Illinois statute that excluded actions for out-of-state deaths so long as the case could be pursued in the state of the death). For purposes of the analysis immediately above, however, we have assumed that jurisdiction is available in the law-supplying state. We consider deviating assumptions below.

¹⁹³ We refer interchangeably to state interests and state-court interests.

procedures and remedies to the different bells and whistles attached to sister-state-claims.¹⁹⁴ In addition, witnesses and evidence may be less likely to be found in the forum if the plaintiff's claim arose outside the forum state. These concerns become exacerbated when the forum dislikes the other state's policies, which is more likely to occur when the plaintiff is asserting sister-state statutory causes of action that are less widely accepted and uniform than traditional transitory common law claims.

These forum-centric reasons for door closing, however, correspond considerably with comity-serving reasons. In their potential role as forums, state courts may readily conclude that law-supplying states would prefer, or at least would not be averse to, self-application of law. Stated differently, in the grand bargain, states in their role as law suppliers are happy to apply, or at least not averse to applying, their own law.¹⁹⁵ Again, this follows from state courts' important role as expositors of the law of a particular state.¹⁹⁶

Scholars such as Lea Brilmayer and Stefan Underhill (whose views we discuss more fully in Part V.C) have noted that deference to another state's desire to apply its own law is a valid reason for the forum to close its doors in particular cases that are recognized exceptions to the *Hughes* requirement, such as those involving divorce and corporate governance.¹⁹⁷ But the interest in self-application of law is perhaps more pervasive, given state courts' role in delineating the law of a particular state.

¹⁹⁴ Cf. *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 128–29 (1904) (holding that ongoing payments required under the Mexican law meant that the federal court in Texas should not entertain the action).

¹⁹⁵ See Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 53–54 (2012) (discussing Delaware's bundling of "substantive provisions and expert decisionmakers"); *id.* at 62–67 (discussing other state legislation attempting to make jurisdiction over certain matters exclusive).

¹⁹⁶ See Verity Winship, *Aligning Law and Forum: The Home Court Advantage*, 81 TENN. L. REV. 1, 29–40 (2014) (discussing advantages of aligning law and forum where lawmaking and expertise are implicated).

¹⁹⁷ See BRILMAYER, *supra* note 8, § 3.3.1, at 151 ("The case is directed to another state for adjudication because the other state is more qualified; the difference in treatment may superficially seem discriminatory but is in fact deferential to the state creating the claim."); *id.* at 152–53 (arguing that domestic relations and criminal law exceptions suggest that "dismissal is appropriate whenever the difference in treatment is based on the other state's desire to hear the case in its own courts," as in the case of "localizing statutes" (internal quotation marks omitted)); Brilmayer & Underhill, *supra* note 9, at 836–38 (making similar arguments); cf. Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1383 (1960) ("[A state's use of forum non conveniens] evinces a decent respect for the interests of other states. In migratory personal-injury litigation there is usually another state that has at least a latent interest in protecting the defendant against the hazards of the plaintiff's forum-shopping, and in having the case tried in its own courts.").

This delineation includes both the reach of rights and their limitations. Justice Black's *Hughes* opinion refers to the "maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states."¹⁹⁸ But the law-supplying state's interest in enforcing its laws is not so much in the "maximum" enforcement—at least in the sense of maximizing the plaintiff's chances of recovery. Rather the law-supplying state presumably wants its law enforced the way the law-supplying state would enforce it—both with respect to rights and limitations on those rights. The obvious way to ensure that law will be applied the way the law-supplying state would apply it is for litigation to occur in the law-supplying state, with its own procedures, judges, and juries.¹⁹⁹ State attempts to confine jurisdiction of their causes of action to their own courts, as well as federal abstention doctrines²⁰⁰ all manifest the notion that the law-supplying sovereignty in many instances prefers, or is not averse to, administration by its own instrumentalities.

In summary, we assume a hypothetical multistate bargain in which states consider whether to have a mandatory door-opening rule versus a comity regime for the typical case where personal jurisdiction is available in the law-supplying state. States as potential forums in a comity regime have incentives to open their doors, but may sometimes have interests in closing them to particular types of cases. States as law-suppliers may prefer, or at least are not averse to, self-application of law. If these suppositions are plausible, then there seems little ground for concluding that states would necessarily prefer a constitutionalized mandatory open-door policy to the comity regime that long preexisted *Hughes*.

c. Should Substantive Policies Trump Procedure?

Larry Kramer, however, has made an argument in a different context—that of suggesting general rules for choice of law—that might help the states' imagined bargain come out in favor of *Hughes* rather than the comity regime.

¹⁹⁸ *Hughes v. Fetter*, 341 U.S. 609, 612 (1951).

¹⁹⁹ The current role of federal courts in diversity is more or less to enforce state law the way states would enforce it, but absent the potential bias against out-of-staters. See John Harrison, *Federal Appellate Jurisdiction over Questions of State Law in State Courts*, 7 GREEN BAG 2D 353, 358 (2004) (treating the purpose of diversity jurisdiction as to provide "the real law of the state," which is the law that state courts apply between in-staters, in cases that "present no temptation to distort that law").

²⁰⁰ See Jordan, *supra* note 8, at 1811 (arguing that a state's not taking jurisdiction of other states' claims or of federal claims should be treated like abstention). Doctrines of primary jurisdiction and exhaustion in administrative law also suggest the desirability of directing cases to the decisionmaker who has been delegated power to administer a particular law.

He argues that one should assume that states overall prefer to forward their substantive policies over their procedural policies.²⁰¹ While he does not specifically apply this argument to the jurisdictional question, the argument would be that the states have a greater interest in advancing enforcement of their substantive statutes in sister states by the *Hughes* open-door requirement than they have in applying their procedural rules that would allow them to close their doors to out-of-state claims absent *Hughes*.

But so long as personal jurisdiction over the defendant is available in the law-supplying state, door closing by other states does not significantly frustrate the substantive policies of the law-supplying state. Indeed, if door closing leads to the action's being brought in the courts of the law-supplying state, that state's substantive interests in the "correct" application of its law is advanced. Interests of states as law-suppliers in advancing their substantive policies through open-door policies therefore cannot reliably be characterized as weightier than their arguably more "procedural" interests in door closing. It thus seems difficult to conclude that states are clearly better off with the rules of *Hughes* than the comity regime that it supplanted.

d. Where No Alternative Forum Is Available

So long as there is an available forum in the law-supplying state, or perhaps some other state, then there is no significant frustration of the law-supplying state's policies by a forum's door closing. If there is no obvious alternative forum in which personal jurisdiction is available against the defendant, however, then states' substantive interests would be impaired by door-closing rules.²⁰² In a grand bargain, states therefore might agree to a door-opening rule for cases in which the forum was the only one with personal jurisdiction over the defendant. The shareholder actions discussed in Part II, including *Broderick v. Rosner*, were cases in which personal jurisdiction against individual shareholders would generally only be available in their state of residence.

Nevertheless, states would also be likely to qualify this jurisdictional requirement with a public policy exception. Indeed, there is a public policy exception to *Hughes* as it stands, and one that commentators such as Brilmayer

²⁰¹ Kramer, *supra* note 191, at 1020–21 (arguing that the states would agree that the substantive policy wins over the procedural policy).

²⁰² See Jordan, *supra* note 8, at 1797, 1805–06 (arguing that states should be under an obligation to take federal and sister-state claims when an adequate alternative forum is unavailable).

and Underhill favor.²⁰³ While such a public policy objection would frustrate the policies of states in their role as law-suppliers to some extent, states would likely find the frustration worth it in order to avoid enforcing repugnant sister-state policies in their role as forums. Such a public policy exception is in any event likely to frustrate only less widely accepted claims for relief—e.g., novel statutory rights, claims to enforcement of disfavored contracts such as covenants not to compete, or claims where the law-supplying state has expansive standing.

At the same time, due process jurisprudence suggests that states could not assert a public policy objection to a small category of cases. Decisional law suggests that states must maintain an adequate system of remedies for at least intentional deprivations of traditional interests in person and property, as opposed to mere statutory violations.²⁰⁴ This law has developed primarily in suits against government officials. But because the due process obligations arose from traditional common law actions whose reach was not limited to government actors, it arguably follows that adequate systems of remedies for intentional deprivations—e.g., assault, battery, and conversion—must be available against private parties as well.²⁰⁵ Disallowing a public policy objection for such claims in cases where no alternative forum was available would be consonant with the Court's decision in *Broderick*, in which no alternative forum was likely, and in which the Court relied on the contractual claim as being one that no state could have a legitimate policy against.²⁰⁶

²⁰³ See, e.g., Brilmayer & Underhill, *supra* note 9, at 836 (noting that the public policy exception calls for maximum enforcement of other states' laws "consistent with the maintenance of the forum's sovereignty").

²⁰⁴ See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 328–29 (1993) (suggesting there may be property interests that a state is compelled to recognize).

²⁰⁵ See, e.g., *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884) ("No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 614 (2005) (indicating that interests in "bodily integrity," "liberty of movement," and "ownership of tangible property" that were injured by intentional misconduct would have strong claims to constitutional protection); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 162 (1997) ("[L]ying behind the background assumption that there is some constitutional compulsion for remedies for governmental trespasses is a further assumption that there must be a system of state remedies for private trespasses."). Obviously the necessity of remedies for certain wrongs does not preclude the constitutional permissibility of certain defenses to liability.

²⁰⁶ See *Broderick v. Rosner*, 294 U.S. 629, 643 (1935). An episodic denial of relief would not necessarily violate this due process norm. See Fallon, *supra* note 204, at 311 (stating that "[t]he ultimate commitment of the law of due process remedies . . . is to create schemes and incentives adequate to keep government, overall

In summary, states would likely agree to entertain one another's claims where an alternative forum was unavailable, subject to a public policy exception. Yet the public policy exception would be unavailable for certain core claims of private right—such as intentional deprivations of traditional interests in life, liberty, and property. The constitutional obligation to entertain sister-state claims would therefore be to entertain claims where there is no obvious alternative forum, and particularly where the claims have strong due process underpinnings. Viewed in this light, the obligation of states to hear the claims of other states derives less from a generalized constitutional obligation of state courts to advance sister-state policies, and more from their obligation to give individuals an opportunity to seek remedies for deprivations of substantive rights.²⁰⁷

e. A Grand Bargain Favoring Plaintiffs?

Perhaps, however, one could argue that states as law suppliers, if joined together in a multistate bargain, would not care very much whether their law was applied the way the law-supplying state would apply it, and thus would favor a door-opening regime such as that prescribed in *Hughes*. One might argue, for example, that states would want to maximize the recovery of home-state plaintiffs (i.e., citizens of the law-supplying state suing in another state) from out-of-state defendants. An adherent to a strong form of interest analysis might therefore argue that law-supplying states might be happy for the plaintiff to get a larger recovery in the forum than its own courts would give, so long as the larger recovery is likely to be imposed on out-of-staters rather than home-staters.²⁰⁸ But in a multistate bargain, the states' overall interests would not be maximized by such a policy because one state's out-of-stater will always be another's home-stater.²⁰⁹ States therefore would not likely agree to entertain other states' claims based on a theory of maximizing home-state-plaintiff recovery.

and on average, tolerably within the bounds of law"). But perhaps one could see states' entertaining such actions from other states when jurisdiction is otherwise lacking as a part of an overall adequate system.

²⁰⁷ The obligation thus would derive more from requirements of due process than from the Full Faith and Credit Clause. See *supra* note 205.

²⁰⁸ See, e.g., Laycock, *supra* note 11, at 274–75 (noting that a preference for local citizens was “deeply embedded” in interest analysis, and that Currie’s whole scheme “depends on his view that the interests of outsiders do not count”—a view violating the requirement of equal treatment under the Privileges and Immunities Clause).

²⁰⁹ See BRILMAYER, *supra* note 8, § 3.3.2, at 161 (indicating that a scheme of making outsiders pay more “would never be adopted by a legislature acting on behalf of the nation as a whole”).

If one puts aside an imagined policy to maximize the recovery of in-state plaintiffs at the expense of out-of-state defendants, then one might ask whether states would have a policy of maximizing plaintiffs' recovery at the expense of defendants regardless of whether the parties were in-staters or out-of-staters. Such a policy, however, seems self-contradictory. It assumes that states as law-suppliers have a general policy of maximum recovery for plaintiffs, even though states as law-suppliers for cases litigated in their own courts implement policies both favoring and limiting liability.²¹⁰

Perhaps one might re-characterize the argument as a general policy favoring plaintiff forum choice to advance plaintiffs' convenience as opposed to advancing plaintiffs' overall chances of recovery. It may be difficult, however, to separate advancing plaintiffs' convenience from a policy of maximizing plaintiffs' recovery. A plaintiff-convenience rationale, moreover, begins to weaken when one assumes (as we do) that plaintiffs have an available forum in the law-supplying state, and perhaps in other states as well, given the operation of comity. To reach the *Hughes* result, states would have to agree that giving plaintiffs additional forum options should trump states' control over their own jurisdiction.

Of course, if one nevertheless believes that a multistate bargain would indeed lead states to agree to this enhance-plaintiffs'-forum-choice policy (whether meant to maximize plaintiff recovery or convenience), then the rule of *Hughes* may make sense. It is clear that *Hughes* advances plaintiffs' objectives by increasing plaintiff forum options,²¹¹ even though, as we have argued, it is not clear that the rule of *Hughes* maximizes other state policy interests. Indeed, Justice Black's positions against forum non conveniens and in favor of wide-open personal jurisdiction over corporations²¹² indicate that he saw maximizing plaintiffs' forum choice as a worthy national policy—a policy that he managed to constitutionalize in *Hughes*.

²¹⁰ *But cf.* Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 65–66 (1991) (arguing that plaintiff forum choice and the application of forum law help to advance overriding concerns for enforcement that are more fundamental than defenses).

²¹¹ *Cf.* Note, *supra* note 143, at 1210 (referring to the statute at issue in *First National Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952), and stating that “the blanket exclusion of residents ignored the frequent situation in which the home forum is the most convenient place to sue”). According to this reasoning, the Full Faith and Credit Clause protects forum residents from inconvenience—a concern that seems questionable as one of constitutional magnitude.

²¹² *See supra* note 159.

In summary, we believe that an imagined multistate bargain would likely result in a comity regime rather than a *Hughes* regime. The states might agree to compulsory door opening for cases where jurisdiction was only available in the forum, but with a public policy reservation. The public policy reservation would be unavailable, however, where the plaintiff's claim was one for which the Constitution might require adequate remedial systems.

C. *The Nondiscrimination Rationale*

If *Hughes* does not seem to be the necessary result of a hypothetical bargain, then perhaps there are other reasons for its being treated as foundational by many scholars. One reason that *Hughes* may have had, and continues to have, appeal is its grounding in a notion of nondiscrimination.²¹³ In a decision two years after *Hughes*, the Court stated that critical to *Hughes* was that “the forum laid an uneven hand on causes of action arising within and without the forum state.”²¹⁴ Scholars, moreover, take *Hughes* to prescribe an equal-protection-style analysis for the Full Faith and Credit Clause.²¹⁵ According to this analysis, state rules that discriminate against out-of-state causes of action generally are subject to a form of heightened scrutiny.²¹⁶ States need a substantial reason for their line drawing and to be able to show that the means chosen (door closing) sufficiently advance those ends,²¹⁷ such inquiries will help to smoke out possible discriminatory animus.²¹⁸

²¹³ See generally Jordan, *supra* note 8, at 1793–97 (arguing against use of a nondiscrimination rule as to jurisdictional duties); *id.* at 1803–05 (arguing that the duty of nondiscrimination should be displaced by focus on prejudice, to reflect contemporary realities that a state's refusal of jurisdiction is often nonprejudicial).

²¹⁴ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518–19 (1953) (holding that the Full Faith and Credit Clause did not bar a Pennsylvania court from granting summary judgment under Pennsylvania's one-year limitations period, although the action would not have been barred in Alabama, whose substantive law applied).

²¹⁵ Kramer, *supra* note 9, at 1983–84 (arguing that, in *Hughes*, Wisconsin had used a discriminatory means to enforce state policies).

²¹⁶ See *id.*

²¹⁷ *Id.* at 1984 (explaining that *Hughes* held that “state rules that discriminate against the laws of other states are subject to some form of intermediate constitutional scrutiny”); cf. Brilmayer & Underhill, *supra* note 9, at 829–30 (positing a principle that once state courts are created “they must be open to enforce causes of action of other equal or superior sovereigns within our federal system unless some valid reason besides ‘mere foreignness’ can be shown”); *id.* at 844 (suggesting in the context of congressional discrimination against constitutional claims that not even rational basis scrutiny would be satisfied).

²¹⁸ See, e.g., Brilmayer & Underhill, *supra* note 9, at 831 (describing the reprobated motive of state courts' refusing jurisdiction as “[r]eserving courts for local law”); Kramer, *supra* note 9, at 1985 (“A better explanation for *Broderick* is that New Jersey had tried to accomplish by subterfuge what Wisconsin had done openly in *Hughes*: to advance its policy by depriving its courts of power to entertain suits based on other states' laws. . . . So long as the state intended to discriminate against claims based on the laws of other states, the Full Faith and Credit Clause's prohibition applies.”).

The principle that states are not allowed to discriminate against one another's laws (whether in a jurisdictional or choice-of-law sense) certainly sounds attractive. But one must be wary of treating as illicit a sovereign's preference for its own law and its own causes of action. Even assuming that in some circumstances a law-supplying state may suffer a collective sense of affront through its agents and constituents, refusal of a state to entertain a sister state's cause of action or to apply sister-state law does not carry a psychological message of inferiority or second-class status—a standard problem with most unlawful discrimination.²¹⁹ Rather, states as political communities exercising sovereignty within a particular territory routinely and legitimately prefer their own laws and policies to those of other states, and they expect other states to do the same.²²⁰ Accordingly, there are numerous instances in which states are allowed to prefer their own law for the very reason that it is their own law.²²¹ We discuss some of these instances below.

1. *Jurisdictional Discrimination and Courts of General Jurisdiction*

All states have courts with the power to hear cases covering a wide variety of subject matters, and the Supreme Court uses the notion of general jurisdiction to support its nondiscrimination principle.²²² Faced with a full faith and credit challenge to state door closing, the Supreme Court can easily conclude that the forum's jurisdiction is adequate to the task of hearing the out-

²¹⁹ See, e.g., DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 56 (2008) (discussing scholars' concepts of wrongful discrimination as implying the lack of equal citizenship, and as involving humiliation); *id.* at 57 (proposing a theory of wrongful discrimination that is defined by demeaning, which involves "a conjunction of expressive action and power").

²²⁰ See Kramer, *supra* note 182, at 312 ("But the primary concern of a State A court is and must be State A law. State A courts are, after all, agents of State A's citizenry and lawmakers, and their paramount responsibility should be the implementation of State A law."). As Jonathan Varat stated in discussing allowable and reprobated state preferences for residents under the Privileges and Immunities Clause, "fulfillment of the fundamental obligation of state government—to care for the state's own residents—depends, to some ill-defined degree, on the ability to withhold from others what a state chooses to provide to its own." Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 490 (1981); see also 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-37, at 1262-64, 1268-69 (3d ed. 2000) (discussing the necessity of states' making distinctions based on residence, and that the citizens of the state are entitled to keep certain goods and services for themselves).

²²¹ Indeed, it may be that a state's duties to treat other states' citizens as equal with its own as to certain matters could conflict with a duty not to discriminate against sister-state laws. *Cf.* Kreimer, *supra* note 35, at 162 (discussing a state's privileges and immunities obligation to allow nonresidents the same access to pregnancy termination as residents, even if the nonresident's state prohibited abortion).

²²² See Brillmayer & Underhill, *supra* note 9, at 828-29 ("Once state courts are established and defined by state legislatures, then, they must be open for actions arising under laws the forum did not create to an extent consistent with their general jurisdiction.").

of-state claims, and thus that the forum is engaged in invidious discrimination against out-of-state causes of action when it excludes them.²²³ At the same time, the Court's reliance on states' having themselves invested their courts with general jurisdiction seemingly respects the states' sovereign ability to determine the subject matter jurisdiction of their own courts.²²⁴ At first glance, then, the concept of general subject matter jurisdiction would seem unhelpful to our argument against a nondiscrimination principle in jurisdiction.

One may, however, question an analysis that looks to state departures from general jurisdiction as a baseline against which to measure whether illicit discrimination has occurred, because—as a historical matter—the notion of general jurisdiction has been fully compatible with discrimination against out-of-state causes of action. At least before *Broderick* and *Hughes*, state courts that exercised their general jurisdiction to entertain other states' causes of action did so as a matter of comity, not obligation. And even after *Hughes*, the notion of general jurisdiction contains many aspects of state preference for its own law. State courts do not enforce the criminal laws of other states,²²⁵ nor are they generally under a constitutional obligation to entertain civil enforcement actions of other states.²²⁶ Indeed, state legislative authorization has generally been thought necessary for state courts of general jurisdiction to entertain the tax enforcement actions brought by officials of other states.²²⁷

Such categorical exclusions from state court general jurisdiction, moreover, go beyond public enforcement actions. A forum is free not to entertain actions connected to sister-state administrative proceedings even where the interested parties are private, and also free to decline to hear other states' workers' compensation actions.²²⁸ As noted above, states may decline to hear divorce

²²³ See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 612 (1951) (noting that the state had no problem with entertaining wrongful death actions as a general matter).

²²⁴ See, e.g., *Brilmayer & Underhill*, *supra* note 9, at 829–30 (stating that although states are not required to create any particular court system, once a state does establish courts, they must be open to enforce causes of action of equal or superior sovereigns unless they have some valid reason beyond “mere foreignness”).

²²⁵ See HAY ET AL., *supra* note 148, § 3.17, at 171–72.

²²⁶ See, e.g., *City of Philadelphia v. Cohen*, 184 N.E.2d 167, 168–69 (N.Y. 1962) (holding that a state court need not entertain a tax action brought by a city of a different state).

²²⁷ See, e.g., HAY ET AL., *supra* note 148, § 3.18, at 173 & n.4 (noting that many states had enacted reciprocal statutes for tax collection); Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 293 (2011) (explaining that in today's interstate tax-collection setting, “most states have felt the need to enact legislation to expand their own courts' jurisdiction to accommodate civil enforcement actions by sister-state officials”).

²²⁸ See BRILMAYER, *supra* note 8, § 3.3.1, at 152–53 (listing and evaluating various exceptions to the obligation to hear out-of-state claims).

and corporate governance actions under the law of other states.²²⁹ State courts also may decline to hear, and may have an obligation to refuse to hear, certain local actions involving real property in other states.²³⁰ And state courts continue to be able to exercise public policy exclusions, *Hughes* notwithstanding.²³¹ In short, courts of general jurisdiction have well-recognized limits on their jurisdiction and its exercise when a party initiates a claim under the law of a sister state.

As discussed above, Brilmayer and Underhill have argued that there are special justifications for many of the categorical instances in which a state may refuse to hear out-of-state causes of action—even though they generally support a nondiscrimination rule. For example, as to enforcement actions, they argue the forum should not be compelled to carry out the official business of other states.²³² But that reasoning merely points out that even courts of general jurisdiction are law-applying arms of particular sovereignties.

In other settings, such as divorce or administrative cases, Brilmayer and Underhill claim that such discrimination is allowed because the forum is recognizing the law-supplying state's strong interest in adjudicating such cases at home.²³³ We have suggested above that the law-supplying state's interest in self-application of law is not limited to a few categories of disputes. To distinguish categorical exceptions from the mine run of cases, Brilmayer and Underhill's antidiscrimination rule makes a distinction between a state's acceptable door closing "motivated by deference to the alternative forum"²³⁴ and reprobated door closing motivated by a desire to "[r]eserv[e] courts for local law."²³⁵ But as suggested above in Part IV.B.2.b, these two supposedly distinguishable motivations come close to being two sides of the same coin. In instances of particularized exclusions, the interest of the law-supplying state in

²²⁹ See *supra* text accompanying note 197; see also *Winship*, *supra* note 195, at 56–60 (discussing problems Delaware has faced in attempting to localize corporate law); *id.* at 75–76 (citing instances where sister-state courts declined to hear Delaware corporate claims, as well as instances where they entertained such claims).

²³⁰ See, e.g., *Clarke v. Clarke*, 178 U.S. 186, 190–91 (1900) (indicating that the courts of the state where the real estate was situated had exclusive jurisdiction to determine the transmission of that property upon the death of the owner who was a domiciliary of another state).

²³¹ See, e.g., Brilmayer & Underhill, *supra* note 9, at 835–36.

²³² BRILMAYER, *supra* note 8, § 3.3.1, at 152; Brilmayer & Underhill, *supra* note 9, at 837.

²³³ Brilmayer & Underhill, *supra* note 9, at 836–37.

²³⁴ BRILMAYER, *supra* note 8, § 3.3.1, at 153.

²³⁵ Brilmayer & Underhill, *supra* note 9, at 231.

applying its own law is closely matched by the interest of the forum in *not* applying it.²³⁶

Quite apart from whether it is possible to separate out or weigh “good” motivation of deference to an alternative forum and “bad” motivation to prefer the forum’s own claims, forum non conveniens doctrine suggests that the motivation to prefer the forum’s own claims is neither bad nor illicit.²³⁷ Under forum non conveniens analysis, it is a permissible factor counting against the exercise of jurisdiction that the underlying cause of action arises under nonforum law.²³⁸

Some commentators, however, distinguish forum non conveniens as not involving discrimination against out-of-state law alone, but rather as a fine-grained case-by-case inquiry into inconvenience that considers a variety of factors.²³⁹ But the factors leading to a forum non conveniens dismissal may frequently boil down to there being a party (particularly the plaintiff) who resides in another state, together with a cause of action that arose in another state and under that state’s laws.²⁴⁰ A forum’s denying access to an out-of-stater based on out-of-state residence alone is undoubtedly a violation of Article IV’s Privileges and Immunities Clause. And if discrimination against out-of-state causes of action standing alone violates the Full Faith and Credit Clause, one might expect the combination of discrimination against out-of-staters and out-of-state causes of action to be constitutionally deadly. But

²³⁶ Indeed, in *Hughes*, Illinois, the law-supplying state, seemed to prefer that it be the state to entertain suits under the Illinois wrongful death statute. See *Hughes v. Fetter*, 341 U.S. 609, 614 (Frankfurter, J., dissenting) (indicating that the Illinois statute provided an action for deaths occurring in Illinois); *First Nat’l Bank v. United Air Lines, Inc.*, 342 U.S. 396, 397 (1952) (indicating that Illinois law provided that Illinois courts generally could not hear actions for deaths outside of Illinois); see also *supra* note 178 (providing more information about *First National Bank*).

²³⁷ See, e.g., *HAY ET AL.*, *supra* note 148, § 3.33, at 202 (“[F]orum non conveniens . . . may discriminate against noncitizens but is useful in preventing plaintiffs from utilizing liberal jurisdictional bases to gain an advantage”); *Currie & Schreter*, *supra* note 197, at 1383–84 (explaining that the forum non conveniens doctrine indicates states do not have an unqualified duty to open their courts to citizens of other states, but rather the duty is to make those residing within their borders respond to civil obligations).

²³⁸ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981); see also *Winship*, *supra* note 196, at 15 tbl.1, 21 (listing forum non conveniens among doctrines that tend toward bundling of law and forum).

²³⁹ See, e.g., *Kramer*, *supra* note 9, at 1984 (arguing that forum non conveniens operates in a more refined manner, whereas Wisconsin’s flat rule against taking jurisdiction over wrongful death actions of other states was “impermissibly overbroad” in that it “irrebuttably presumed” inconvenience); see also *Paulson & Sovern*, *supra* note 44, at 976 (arguing that forum non conveniens is preferable to a state requiring similarity of a sister-state’s statutory action to the forum’s statutory actions).

²⁴⁰ Cf. *Brilmayer & Underhill*, *supra* note 9, at 836 (“Dismissal on forum non conveniens grounds is appropriate when most of the elements of the cause of action occurred outside the forum state and when none of the parties is a citizen of the forum state.”).

under forum non conveniens doctrine, the presence of an out-of-state cause of action helps to neutralize the potential privileges and immunities violation. Similar results can occur under state long-arm statutes, where the applicability of out-of-state law is an allowable factor in denying jurisdiction.²⁴¹ Thus, the notion of state animus or discrimination against sister-state law in the jurisdictional context may be a faulty beginning point for analysis.

If, however, one were to insist on treating discrimination against sister-state causes of action as presumptively forbidden, and on treating such discrimination as subject to a form of heightened or intermediate scrutiny, it is not impossible to make arguments to explain why such discrimination is sometimes allowed and sometimes not allowed. Intermediate scrutiny's requirement of a substantial justification is sufficiently malleable that it may justify a variety of results. A *Hughes* proponent might therefore argue that giving negative weight to the presence of out-of-state law in forum non conveniens analysis is substantially justified by the forum's and parties' interest in avoiding inconvenient litigation, while door-closing rules lack a similarly substantial justification.²⁴²

But one could equally plausibly conclude that the jurisdictional exclusion at issue in *Hughes* (as well as in other potential door-closing cases) satisfies such scrutiny as a form of rule-based forum non conveniens.²⁴³ The "foreignness" of a cause of action largely overlaps with forum non conveniens factors: witnesses, evidence, and parties located in other states.²⁴⁴

Larry Kramer argues that while inconvenience can be a substantial reason for refusing jurisdiction, nevertheless, the per se rule of excluding out-of-state wrongful death suits at issue in *Hughes* impermissibly "irrebuttably presumed" inconvenience.²⁴⁵ Intermediate scrutiny, however, does not necessarily forbid

²⁴¹ See BRILMAYER, *supra* note 8, § 3.3.1, at 151 (pointing out that state long-arm statutes tend to exclude certain categories of nonforum causes of action); SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 494 (2d ed. 2003) (raising the question of whether state door closing through long-arm statutes is different from *Hughes*).

²⁴² See, e.g., Kramer, *supra* note 9, at 1984.

²⁴³ The classification would by extension satisfy minimal scrutiny equal protection analysis. *But cf.* CURRIE, *supra* note 8, at 304–07 (arguing that a state court's refusing jurisdiction over a resident's claim because the injury occurred out of state would be irrational).

²⁴⁴ See *Hughes v. Fetter*, 341 U.S. 609, 618–19 (Frankfurter, J., dissenting) (citing possible state concerns as to witnesses and foreign law); *cf.* Note, *supra* note 143, at 1209 (observing that "the main purpose of the Illinois statute" that the Court invalidated in *First National Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952), "was to prevent importation of litigation").

²⁴⁵ Kramer, *supra* note 9, at 1984.

the use of rules, despite some over- and underinclusion.²⁴⁶ To insist on case-by-case refusals to hear an action is to disable the state from proceeding by general rule in those cases that may frequently enough present a forum non conveniens type of problem. Such insistence, moreover, also may have the effect of rejecting legislative door-closing rules in favor of more malleable judicial standards. Yet it is generally agreed that it is desirable to resolve jurisdictional questions by rules rather than standards.²⁴⁷ The various categorical exceptions to entertaining out-of-state claims (obviously) operate categorically, rather than asking, for example, whether a particular out-of-state shareholder derivative action or divorce should proceed.

Those favoring an antidiscrimination norm also find support in cases such as *Mondou v. New York, New Haven & Hartford Railroad*,²⁴⁸ in which the Supreme Court held that state courts that entertained similar state-law actions could not discriminate against federal causes of action under the FELA.²⁴⁹ One could argue that the Court wrongly decided *Mondou*, because the federal government can always supply its own courts for its own affirmative statutory claims.²⁵⁰ In short, because federal causes of action need not want for a forum even if states decline to hear them, one may question whether a nondiscrimination norm should apply when a state declines to hear federal statutory actions.²⁵¹

²⁴⁶ See, e.g., *Nguyen v. INS*, 533 U.S. 53, 56–59 (2001) (upholding a statute imposing affirmative steps for the acquisition of citizenship by a child born abroad to a citizen father but not on a child born to a citizen mother).

²⁴⁷ See, e.g., *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (favoring “simple jurisdictional rules” over “complex jurisdictional tests”).

²⁴⁸ 223 U.S. 1 (1912).

²⁴⁹ *Id.* at 59; see also *Haywood v. Drown*, 556 U.S. 729, 731, 736–37 (2009) (rejecting even a nondiscriminatory state jurisdictional rule that was said to be motivated by hostility to prisoners’ federal claims).

²⁵⁰ See *id.* at 742 (Thomas, J., dissenting) (arguing that the Supremacy Clause does not require a nondiscrimination rule as to jurisdiction).

²⁵¹ See, e.g., *Jordan*, *supra* note 8, at 1789–90 (arguing that because federal question jurisdiction was provided in 1875, and because personal jurisdiction has expanded, a state court’s refusal to hear a federal claim will rarely prejudice the claim, and a nondiscrimination rule should not be applied); see also *Bellia*, *supra* note 43, at 972 (“[S]tates had interests in judicially enforcing federal actions . . . [T]hat state courts had a power, but not a duty, to enforce federal law . . . comported with general jurisdictional principles of the law of nations.”); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 45, 144–49, 168 (arguing that the Supremacy Clause was long understood to require states “to apply federal substantive norms that happened to be implicated in the decision of cases which state law gave them the power to hear” but did not entail jurisdictional duties); Collins & Nash, *supra* note 227, at 286–96 (arguing for the limited reach of *Testa v. Katt*, 330 U.S. 386 (1947), in the context of state enforcement of federal criminal law).

But one need not take the argument so far. It is enough to point out that *Mondou* was based in part on the impossibility of states' having substantive policies different from those of the federal government.²⁵² By contrast, states legitimately have policies that differ from policies of other states, and they are in many circumstances allowed to prefer their own policies to those of other states. Stated differently, the obligations of the Supremacy Clause may be stronger in terms of a door-opening requirement than the obligations of the Full Faith and Credit Clause.²⁵³

2. *Discrimination in Choice of Law*

Any argument for a nondiscrimination rule as to state jurisdiction must also face the constitutional allowance of discrimination against out-of-state law in choice of law.²⁵⁴ When states take jurisdiction of a claim, they apply their own conflict-of-laws rules and often do so in such a way as to prefer their own law to sister-state law. The Court's indulgence of such preferences was evident prior to *Hughes*,²⁵⁵ and only increased thereafter.²⁵⁶ The Court's minimal scrutiny as to choice of law allows states to prefer their own law so long as a plausible connection with the state exists. And even scholars such as Larry Kramer would—as a matter of constitutional law—allow states to advance their own policies when they have such a connection to the claim.²⁵⁷ If such a naked preference is allowed in this choice-of-law context, then it is difficult to see why the preference for one's own causes of action for jurisdictional purposes should be disallowed as a matter of full faith and credit.

²⁵² *Mondou*, 223 U.S. at 57.

²⁵³ *But see Haywood*, 556 U.S. at 755 n.5 (Thomas, J., dissenting) (arguing for the opposite proposition).

²⁵⁴ *See, e.g., CURRIE, supra* note 8, at 308 (“[W]here the forum is free to apply its own . . . law it is difficult to see what the Full Faith and Credit Clause has to do with the constitutional obligation to provide a forum.”); *FELIX & WHITTEN, supra* note 8, at 247 (questioning *Hughes* in light of Wisconsin's having sufficient contacts to apply its own law).

²⁵⁵ *See Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 497, 500–01 (1939), *discussed supra* text accompanying notes 135–39.

²⁵⁶ *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (finding that the interests of Minnesota, where the plaintiff moved after her husband's death in Wisconsin, made application of Minnesota's insurance law “neither arbitrary nor fundamentally unfair”); *see also Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (allowing the forum state to apply its own statute of limitations to a claim governed by the law of another state); *Borchers, supra* note 8, at 160–61, 163–64 (discussing these cases as significantly qualifying a nondiscrimination rule).

²⁵⁷ *Kramer, supra* note 182, at 335–36.

V. REASONING FROM *HUGHES*

In Part IV, we argued that the allowance of discrimination in areas of both jurisdiction and choice of law suggests that *Hughes* was wrongly decided. But the argument might be turned around by those who favor the *Hughes* result—to argue that these areas where discrimination is allowed should be brought in line with *Hughes*. And some scholars have taken *Hughes*'s nondiscrimination rule, with its concerns as to animus against out-of-state law, as a foundational notion for arguments to extend the antidiscrimination principle into related areas. Indeed, *Hughes* has perhaps proved to be more important as it bears on these sorts of arguments than it has proved in changing the jurisdictional practices of the state courts.²⁵⁸ We think, however, that given the problems of *Hughes*, arguments for a nondiscrimination norm in other areas should stand or fall on their own merits without reliance on *Hughes*. We focus on three areas in which scholars have sought to extend *Hughes*'s nondiscrimination norm: choice of law, the public policy exception, and jurisdiction stripping.

A. A Nondiscrimination Principle in Choice of Law?

Choice of law presents a strong case for a nondiscrimination rule, but does not suggest that *Hughes* was correctly decided. Discrimination in choice of law (which the Court tolerates) means that obligations arising from the same primary behavior will vary depending on where the action is brought.²⁵⁹ And

²⁵⁸ State courts occasionally cite *Hughes* for the proposition that a state may not decline jurisdiction simply because the action is a sister-state claim. *See, e.g.*, *Shewbrooks v. A.C. & S., Inc.*, 529 So.2d 557, 561 (Miss. 1988); *see also* *Millsap v. Cent. Wis. Motor Transp. Co.*, 189 N.E.2d 793, 797 (Ill. App. Ct. 1963) (relying on *Hughes* to entertain a sister-state action for contribution). More typical are state court references to *Hughes* for its uncontroversial choice-of-law statement that states are not “automatically obliged” to subordinate their own policies to those of sister states. *See, e.g.*, *State v. Langlands*, 583 S.E.2d 18, 20 n.4 (Ga. 2003); *State v. Menard*, 888 A.2d 57, 62 n.5 (R.I. 2005). And *Hughes* is routinely viewed as consistent with a public policy objection to entertaining a sister-state claim. *See, e.g.*, *Ferreri v. Hewitt Assocs., LLC*, 908 N.E.2d 1073, 1076 (Ill. App. Ct. 2009); *Texaco, Inc. v. Vanden Bosche*, 219 A.2d 80, 83 (Md. 1966); *McDade v. Moynihan*, 115 N.E.2d 372, 375 (Mass. 1953). More significant, perhaps, is what *Hughes* has *not* prevented states from doing. *See, e.g.*, *City of Philadelphia v. Cohen*, 184 N.E.2d 167, 169–70 (N.Y. 1962) (refusing to entertain a sister-state claim for tax liability, *Hughes* notwithstanding); *McGrath v. Tobin*, 103 A.2d 795, 796–97, 800 (R.I. 1954) (refusing, despite *Hughes*, to enforce a sister-state wrongful death statute because the forum deemed it penal); *Paper Prods. Co. v. Doggrell*, 261 S.W.2d 127, 130 (Tenn. 1953) (refusing to enforce a sister-state civil action under penal law; finding *Hughes* “not . . . helpful” to the inquiry); *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 686 (Tex. 2006) (refusing to entertain sister-state antitrust claims, but not mentioning *Hughes*). And only one state court decision appears to have ever cited *Hughes*'s “maximum enforcement” language. *See* *Houston v. Whittier*, 216 P.3d 1272, 1279–80 (Idaho 2009).

²⁵⁹ *See, e.g.*, *Allen & O'Hara*, *supra* note 183, at 1041 (stating that primary predictability should be the main goal of choice-of-law rules); *Kramer*, *supra* note 182, at 313 (arguing that uniform choice-of-law rules would discourage forum shopping, and that most scholars “agree that rules facilitating this strategic behavior

by applying its own law, the forum may significantly alter the rights and liabilities from those that more neutral conflicts rules would generate, suggesting opportunities for unfairness to parties.²⁶⁰

By contrast, jurisdictional discrimination as to causes of action (which the Court does not tolerate) tends to promote the very uniformity that discrimination in choice of law undermines. State door-closing rules tend to direct claims to the state whose law most likely would govern under neutral conflicts rules, and thereby promote uniform application of that law. *Hughes* itself shows that door closing can increase uniformity in the law applicable to a transaction, insofar as the opinion implied that Wisconsin, although its courts were compelled to take jurisdiction of the Illinois wrongful death claim, could constitutionally have elected to apply Wisconsin law instead.²⁶¹

Because of the problems of disuniformity arising from state constitutional freedom in the choice-of-law area, many scholars have imagined that, in a Baxter-style grand bargain, states would agree to largely neutral conflict-of-laws rules.²⁶² In such a context, a nondiscrimination rule would be justified based on the premise that the states would likely agree to it. But because disuniformity does not arise from door-closing rules, states would not necessarily agree to the rule of *Hughes* on that ground.

B. Nondiscrimination as Leading to Rejection of a Public Policy Exception?

In addition to arguments for a general change in choice-of-law rules, *Hughes* has been used to support arguments against a public policy exception to applying sister-state law—both with respect to taking jurisdiction, and with respect to choice of law in cases in which the court exercises jurisdiction.²⁶³

are undesirable”); Laycock, *supra* note 11, at 296, 301 (arguing that full faith and credit means that the law governing a case should be the same wherever it is filed).

²⁶⁰ One inevitably faces a baseline problem in determining what the “fair” choice of law is. See Kramer, *supra* note 182, at 313 n.117.

²⁶¹ See *Hughes v. Fetter*, 341 U.S. 209, 612 n.10 (1951) (distinguishing the case from those in which the state court chooses to apply its own law).

²⁶² See Kramer, *supra* note 182, at 315 (arguing that in an ideal world, states would negotiate rules to resolve true conflicts); cf. Laycock, *supra* note 11, at 322–23 (arguing that some form of uniform territorial-based rules should govern).

²⁶³ The most-objected-to use of a public policy exception is in choice of law, when a court uses liability rules of another state while refusing to apply certain sister-state defenses. See Kramer, *supra* note 9, at 1973–74 (indicating that public policy exceptions are more innocuous when they result in denials of jurisdiction rather than taking the case and applying forum law); Jordan, *supra* note 8, at 1804–05 (finding public policy objections to be generally acceptable when refusing jurisdiction, but opposing their use to foreclose defenses due to their prejudicial effect on the claim). While Kramer and Laycock both are more focused on choice of

Both Douglas Laycock and Larry Kramer have argued against the use of such an exception.²⁶⁴ For example, Laycock has argued that the equal status of sister-state law required by the Full Faith and Credit Clause precludes a state from rejecting sister-state law “on the ground that it too deeply offends the public policy of the forum.”²⁶⁵

The move from *Hughes* to foreclosing a public policy exception is perhaps logical, if one assumes that *Hughes* and the Full Faith and Credit Clause manifest a general principle that states cannot treat out-of-state law less favorably than their own law for either jurisdictional or choice-of-law purposes. If sister-state law must be treated on an equal footing with forum law, it arguably would follow that the forum court should not be able to refuse to accord jurisdiction to a cause of action based on an out-of-state statute or otherwise refuse to apply that statute based on a public policy objection.²⁶⁶

This suggestion becomes complicated, however, when one takes into account that states are allowed to discriminate in choice of law. While arguing against a public policy exception in the choice-of-law area, Kramer accepts that a forum is constitutionally allowed to advance its own policies in preference to those of other states when the forum has sufficient connection to the lawsuit.²⁶⁷ Kramer sought to work his way around this apparent contradiction by assuming that a state was free to apply its own (possibly discriminatory) choice-of-law rules, but could not make a public policy exception to the application of those rules. He was particularly focused on states’ refusals to recognize same-sex marriages that were valid under the laws of the place of celebration.²⁶⁸ For him, when a state’s ordinary choice-of-law rules for recognition of marriages (e.g., place of celebration) would point to the application of sister-state law, thereby indicating that the forum has insufficient interest to apply its own law, then the forum would not be allowed to

law than on jurisdiction, their arguments against public policy exceptions would seem to encompass both jurisdictional and choice-of-law situations.

²⁶⁴ Kramer, *supra* note 9, at 1980; Laycock, *supra* note 11, at 313.

²⁶⁵ Laycock, *supra* note 11, at 313.

²⁶⁶ For example, under that view, a forum court could not refuse to apply a forum-state statute (either providing a cause of action or some other aspect of law) due to a subconstitutional public policy objection to the statute. Similarly, the forum court could not refuse to apply controlling authority from a higher court in the state due to a public policy objection.

²⁶⁷ See Kramer, *supra* note 9, at 1967 (explaining this principle in the context of marriage law).

²⁶⁸ See *id.*

discriminate against the content of out-of-state law based on a public policy objection (e.g., to same-sex marriage).²⁶⁹

Kramer's critics have raised a number of objections to his analysis. They argue that he has taken insufficient account of the choice-of-law cases that qualify the *Hughes* nondiscrimination rule itself.²⁷⁰ The public policy exception in the interjurisdictional marriage cases, they argue, fits comfortably within interest analysis, because the forum has a sufficient interest to apply its own law when at least one of the parties resides in the state.²⁷¹ A public policy exception, moreover, has traditionally been available, and is an essential part of the place-of-celebration rule.²⁷² What is more, consideration of the content of the law is inherent in interest analysis despite Kramer's claim that choice-of-law doctrines generally attempt to avoid evaluation of the content of law.²⁷³

Ultimately, many of these critics argue that full faith and credit is not the appropriate avenue for requiring states to recognize same-sex marriage. Rather, any such requirement would be more appropriately located in equal protection

²⁶⁹ *Id.*; cf. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (relying in part on the respect generally given state marriage law in evaluating the federal government's blanket refusal to recognize same-sex marriages for purposes of federal law). There is debate whether *Windsor* would require states to recognize sister-state same-sex marriages. See William Baude, *Interstate Recognition of Same Sex Marriage After Windsor*, 8 N.Y.U. J.L. & LIBERTY 150, 154–55 (2013) (suggesting that one of *Windsor*'s "lines of reasoning," which focuses on liberty interests and equal treatment provides "some support" for a right to interstate same-sex marriage recognition, while its other line of reasoning, which focuses on federalism, does not, "and may even cut against it"). Even if *Windsor* can be read as requiring such recognition, however, it would not be as a consequence of the Full Faith and Credit Clause, but as a consequence of the Fourteenth Amendment and its protection (at the state level) of liberty interests and equal treatment. If so, the Fourteenth Amendment would be acting as a trump on the ordinary allowance under the Full Faith and Credit Clause of a public policy objection to recognition of sister-state marriages.

²⁷⁰ See, e.g., Borchers, *supra* note 8, at 160–61, 173–78; Maltz, *supra* note 97, at 535–36; Richard S. Myers, *The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships*, 3 AVE MARIA L. REV. 531, 546 (2005).

²⁷¹ See, e.g., Myers, *supra* note 270, at 544–45 (explaining that in the context of interjurisdictional marriage disputes, the forum is using the public policy exception consistently with interest analysis); Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 192, 198–201 (1996) (indicating that states have long rejected marriages on public policy grounds and that the state of domicile has the strongest interest in applying its law).

²⁷² See, e.g., Borchers, *supra* note 8, at 155 (discussing the long history of a public policy exception to the place-of-celebration rule); see also FELIX & WHITTEN, *supra* note 8, at 249 (asking, with respect to Kramer's argument that *Hughes* can be read as supporting a nondiscrimination rule that prohibits states from using public policy exceptions, "Can the molehill of *Hughes* support this mountainous reasoning?").

²⁷³ See, e.g., Borchers, *supra* note 8, at 170 ("[T]o the extent Kramer's argument purports to deny courts the ability to consider [states'] substantive preferences in making choice-of-law decisions, it runs counter to what courts have done since the [conflict-of-laws revolution] began."); Myers, *supra* note 270, at 538–39 (arguing that use of the public policy exception was a precursor to interest analysis, and pointing to Paulson & Sovern, *supra* note 44).

or fundamental rights analysis.²⁷⁴ Stated differently, the question should be framed as whether there is a state duty of nondiscrimination against certain classes of people or whether there is a substantive right to same-sex marriage, rather than as a question of whether there is a state duty of nondiscrimination as to the law of other states.

What is more, the hypothetical multistate bargain—a methodology Kramer often employs—would not necessarily result in the demise of a robust public policy exception to choice-of-law rules, even if it would result in otherwise uniform and nondiscriminatory choice-of-law rules. We argued above that states would likely reserve a public policy exception as to any jurisdictional obligations;²⁷⁵ that argument would apply to choice-of-law obligations as well. Some potential frustration of each state’s substantive policies through nonenforcement of their own law in sister states might be an acceptable trade-off for states’ not having to enforce repugnant causes of action and law of sister states.

Thus, one may surmise that a grand bargain would likely result in a nondiscrimination rule as to choice of law (which the Court does *not* currently require), with a public policy exception (which *is* allowed under current practice). At the same time, states likely would not agree to a nondiscrimination rule as distinguished from a comity regime in according jurisdiction. States, however, likely would agree to entertain each other’s claims when no other forum was available, but subject to a public policy exception,²⁷⁶—which, in turn, would be unavailable when certain constitutionally required relief was at stake.

²⁷⁴ See, e.g., Maltz, *supra* note 97, at 542 (noting that although there might be strong doctrinal arguments for same-sex marriage given the Supreme Court’s sex discrimination and marriage jurisprudence, the Full Faith and Credit Clause should not be distorted to reach that end); cf. *Windsor*, 133 S. Ct. at 2695 (relying on Fifth Amendment liberty and equality principles).

²⁷⁵ See *supra* text accompanying notes 203–06. Indeed, DOMA itself is some evidence that the states would not bargain away the public policy exception.

²⁷⁶ As Brilmayer and Underhill have stated in the jurisdictional context, “The public policy exception to this clause [Full Faith and Credit] insures that the forum’s sovereignty will not be impaired by the ‘extraterritorial application’ of another state’s policies.” Brilmayer & Underhill, *supra* note 9, at 836 (footnote omitted); see also BRILMAYER, *supra* note 8, § 3.3.1, at 153 (“The important question is whether the dismissal is motivated by deference to the alternative forum and by the needs of the interstate judicial system as a whole.”).

C. *Jurisdiction Stripping and Nondiscrimination?*

1. *The Argument for Use of a Nondiscrimination Principle*

Finally, some have argued for extension of the *Hughes* nondiscrimination rule into the realm of federal courts law—that is, into the “jurisdiction stripping” debate. The central question of this debate is whether Congress can cut back the jurisdiction of the Supreme Court and/or lower federal courts when it dislikes the constitutional decisions of those courts. The question thus is more squarely addressed to jurisdictional, not choice-of-law, issues. The traditional view is that Congress has considerable power to restrict the jurisdiction of the federal courts and that it may selectively exclude certain classes of claims from those courts in favor of state courts, based on its hostility toward those rights as interpreted by the federal courts.²⁷⁷

Despite their general acceptance of a public policy exception in the choice-of-law setting,²⁷⁸ Lea Brilmayer and Stephan Underhill argue that full faith and credit cases such as *Hughes* manifest a general principle that courts cannot discriminate against the law of equal and superior sources of law.²⁷⁹ They find additional support for their nondiscrimination principle in Supremacy Clause cases,²⁸⁰ in which the Court has required state courts to entertain federal statutory claims.²⁸¹

Brilmayer and Underhill recommend translation of this conflict-of-laws nondiscrimination rule to the jurisdiction-stripping debate.²⁸² They argue that the notion of nondiscrimination against equal or higher sources of law means that Congress cannot discriminate against constitutional rights in its jurisdictional statutes. Separation of powers principles require that other political and judicial institutions treat Supreme Court constitutional decisions as binding, and thus as a higher source of law than congressional legislation. If Congress carved out particular constitutional claims from the federal courts’

²⁷⁷ See, e.g., Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1892–96 (2008) (describing the traditional view).

²⁷⁸ See Brilmayer & Underhill, *supra* note 7, at 835–36.

²⁷⁹ See *id.* at 821, 825.

²⁸⁰ See, e.g., *Mondou v. N.Y., New Haven & Hartford R.R.*, 223 U.S. 1, 58–59 (1912) (requiring states to entertain claims brought under the Federal Employers’ Liability Act); see also *Testa v. Katt*, 330 U.S. 386, 393–94 (1947) (requiring state courts to entertain claims brought under the Emergency Price Control Act).

²⁸¹ See Brilmayer & Underhill, *supra* note 9, at 838–40.

²⁸² *Id.* at 821, 831 (analogizing to the Full Faith and Credit and Supremacy Clause cases, but premising their claim on the “supremacy principle announced in *Marbury v. Madison*”).

jurisdiction without also excluding analogous statutory claims, they argue that the exclusion should be struck down as discrimination against a higher source of law.²⁸³ The only plausible explanation for a distinction between constitutional and statutory claims, they further argue, would be a reprobated hostility or discriminatory purpose against higher law.²⁸⁴ Their discrimination test would therefore invalidate jurisdiction-stripping statutes that were so motivated, whether directed to the Supreme Court alone, the lower federal courts alone, or the two together.²⁸⁵

2. Critique of the Use of a Nondiscrimination Principle

We have argued that a *Hughes*-derived notion of nondiscrimination against the law of other sovereigns is not a solid foundational principle in the door-closing setting, in part because states may legitimately prefer their own law to that of other states in many circumstances.²⁸⁶ In the jurisdiction-stripping context, a similar argument exists that Congress may in many instances legitimately be hostile to court-announced constitutional decisions.²⁸⁷

Madisonian separation of powers contemplates a measure of interbranch hostility—hostility that inherently encompasses the source (in another branch) and content of decisions (i.e., not the same decision that this particular branch would make).²⁸⁸ Article III’s allowing for congressional choices between state and federal courts seems to entail an idea that Congress can make such choices based on a preference for the source and content of state court determinations

²⁸³ *Id.* at 846–47 (indicating that congressional jurisdiction rules must be neutral as between statutory and constitutional claims).

²⁸⁴ *Id.* at 833 & n.73 (indicating that the facial discrimination between statutes and the Constitution would prove the reprobated purpose “because any plausible explanation of the bills’ purpose [would] be illegitimate”); *id.* at 844–46 (arguing that hostility to constitutional rights, or substantive disagreement with the court-articulated content of rights, does not supply a rational basis for the discrimination).

²⁸⁵ *Id.* at 848.

²⁸⁶ We similarly have doubts about the extent to which state courts have duties to take jurisdiction of federal statutory causes of action, although we have alluded to those arguments only briefly in this Article. *See supra* text accompanying notes 248–51.

²⁸⁷ *See* Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1036 (1982).

²⁸⁸ *See, e.g., id.* at 1037 (arguing that it is legitimate for Congress to express concerns about substantive constitutional matters through jurisdiction regulation); *see also* Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17, 21 n.10 (1981) (collecting scholarship to the effect that Congress’s possible powers to strip jurisdiction promote a healthy dialogue between the Court and Congress); *id.* at 39 n.63 (collecting sources that see the threat of jurisdiction stripping as an appropriate majoritarian check that enhances Court legitimacy).

over the source and content of federal court determinations.²⁸⁹ The Constitution treats state courts as adequate substitutes for federal courts for the resolution of most federal issues—including constitutional questions—even if Congress perceives they might enforce those rights differently from the federal courts.²⁹⁰ That such rearrangements may lead to enforcement in state courts that is diluted (or enhanced) from what it would be in federal court is an inevitable result of congressional jurisdictional choice.²⁹¹ Thus, the traditional position of federal courts scholars on jurisdiction stripping has been that Congress has near plenary power,²⁹² with only a few exceptions.²⁹³ And if interbranch hostility is inherent in separation of powers, it would seem to follow that congressional “discrimination” against the Court’s constitutional precedent does not in itself make out a constitutional violation.

Richard Fallon, however, has recently argued for a purpose test in jurisdiction stripping that may be subject to fewer objections than Brilmayer and Underhill’s discrimination test.²⁹⁴ Just as they do, Fallon assumes that our constitutional system requires that the other federal and state branches of government treat Supreme Court constitutional decisions as binding.²⁹⁵ The

²⁸⁹ Bator, *supra* note 287, at 1035–36 (arguing that Article III grants Congress the power to discriminate based on different subject matters); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 917–18 (1984) (arguing against a notion that Congress’s singling out of classes of issues is suspect: “The central problem is that it too readily extends the analysis of the obvious flaw in laws that distinguish among *litigants* on the basis of race or other forbidden criteria to jurisdictional statutes that differentiate on the basis of *subject matter*”). *But cf.* Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 516 (1974) (arguing that the only legitimate reason for Congress to curtail federal jurisdiction is to address docket overloads).

²⁹⁰ See Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 156–57 (1982) (arguing that “constitutional history . . . has always assumed that state courts” were equal to “federal courts as protectors of constitutional rights”).

²⁹¹ Gunther, *supra* note 289, at 918 (stating that, given Article III, Congress’s assigning some issues to state courts does not “‘discriminate against,’ or ‘burden,’ or ‘prejudice’ the rights involved”).

²⁹² See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (concluding that state courts are the ultimate guarantors of constitutional rights).

²⁹³ See, e.g., Bator, *supra* note 287, at 1034 (noting equal protection-type exclusions); Gunther, *supra* note 289, at 910 (noting that all agree that Congress cannot dictate outcomes in constitutional cases, nor require a court to decide a case in disregard of the Constitution).

²⁹⁴ Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1052 (2010). We primarily address Fallon’s arguments, and do not purport to address here the whole of the jurisdiction-stripping literature.

²⁹⁵ See *id.* at 1075 (proceeding from the premise that “following an attempted stripping of federal jurisdiction, the Supreme Court’s precedents would remain binding on state courts as a matter of law”); see also Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 877 &

purpose that Fallon treats as illicit, however, is not “discrimination” or unequal treatment between constitutional and statutory rights, but rather an “evident purpose . . . to invite state court defiance of past authoritative Supreme Court decisions.”²⁹⁶ For Fallon, lower court jurisdiction stripping would generally be constitutionally acceptable because inviting defiance of Supreme Court precedent would “be both an unlikely congressional motivation for, and unlikely result of, jurisdiction-stripping that left Supreme Court review of state court judgments intact.”²⁹⁷

As his statement suggests, Fallon is concerned not only with purpose but also effect—effective abrogation of Supreme Court precedent. Fallon argues that Congress should not be able to achieve indirectly “aims that the Constitution would forbid the government to pursue directly.”²⁹⁸ Because Congress’s direct abrogation of constitutional rights and remedies by legislation would be subject to constitutional scrutiny, so too should its attempt to accomplish the same end through jurisdiction stripping.

Fallon’s concern for effective abrogation of constitutional precedent—and by extension constitutional rights—might suggest, however, that the actual effects on constitutionally necessary remedies, rather than the intent of Congress, should be the principal indicia of unconstitutionality. Consider, for example, that Congress “directly” reduced remedies available to prisoners in the Prison Litigation Reform Act.²⁹⁹ The main question in determining the validity of such a direct reduction of remedies for constitutional violations is whether the remaining remedies are constitutionally adequate rather than whether Congress intended to reduce such remedies.³⁰⁰ If Congress were to

n.33 (2011) (citing authorities for the obligation of lower courts to follow Supreme Court precedent); Sager, *supra* note 288, at 68 (arguing that Congress should not be able to “undo the Supreme Court’s constitutional doctrine . . . by manipulating federal jurisdiction”). *But cf.* Fallon, *supra* note 294, at 1062, 1086 (expressing some reservations about arguing from the federal courts’ role as ultimate arbiters of the Constitution); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 504–05 (2000) (arguing that Congress could change existing rules of precedent).

²⁹⁶ Fallon, *supra* note 294, at 1052; *see also* Sager, *supra* note 288, at 42 (arguing that “Congress cannot selectively remove federal jurisdiction to achieve unconstitutional substantive ends”); *id.* at 68–69 (arguing that Congress, by jurisdiction stripping, would be inviting illegality by the states).

²⁹⁷ Fallon, *supra* note 294, at 1095.

²⁹⁸ *Id.* at 1081; *see also* Sager, *supra* note 294, at 68 (“Congress ordinarily cannot undo the Supreme Court’s constitutional doctrine by simple legislative fiat, and it should not be able to accomplish the same end by manipulating federal jurisdiction.”).

²⁹⁹ 42 U.S.C. § 1997e(e) (2006) (prohibiting damages for emotional distress absent physical injury in suits by prisoners).

³⁰⁰ *Cf.* *Miller v. French*, 530 U.S. 327, 347 (2000) (noting that “the PLRA has restricted courts’ authority to issue and enforce prospective relief concerning prison conditions,” and assuming, without deciding, that the

seek to reduce remedies “indirectly” to prisoners by stripping federal courts of jurisdiction, presumably the central question should be the same (given the premise that Congress should not be able to accomplish indirectly what it cannot accomplish directly)—namely, whether the remedies that remain are constitutionally adequate.

Fallon’s purpose test, however, might be justified because it may be difficult to prove effects when Congress acts by jurisdiction stripping rather than by directly altering rights and remedies. As Fallon states, “When important constitutional values are at stake, and it is difficult for the Supreme Court to agree on an alternative test of constitutional validity to protect those values, purpose tests provide a minimal protection against abuses of governmental power.”³⁰¹ Concern for substantive constitutional rights, rather than concern for “discrimination,” therefore seems to be at the heart of Fallon’s approach. His approach thus does not share Brilmayer and Underhill’s problem of treating constitutionally contemplated interbranch hostility in itself as constitutionally off-limits.

Even if one accepted Fallon’s approach to federal jurisdiction stripping, however, such acceptance would not entail a conclusion that *Hughes v. Fetter* was rightly decided. An analogous purpose test in the door-closing context would need to find justification in a concern that state door closing significantly impairs substantive entitlements of the plaintiffs under the laws of the sister states. But in *Hughes* and similar cases, jurisdiction was available in the law-supplying state, whose courts structurally are the most capable of enforcing those rights “accurately.”

In some classes of cases, however, declining jurisdiction may indeed undermine the enforcement of substantive rights under the laws of the sister state because the forum is the only state in which personal jurisdiction over the defendant is possible. This was true in *Broderick v. Rosner*—discussed in Part II—where it was unlikely that the shareholder liabilities could be enforced against shareholders outside their domicile, and where the Court considered the

new standards were effective); *id.* at 348, 350 (holding that the automatic stay provisions did not violate separation of powers). *But cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (O’Connor, J., plurality opinion) (disallowing state abortion regulations imposing undue burdens, defined by a “purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”). The “purpose or effect” language arguably allows invalidation of an abortion regulation based on legislative purpose alone, without reference to whether abortion availability was reduced below what is constitutionally required.

³⁰¹ Fallon, *supra* note 294, at 1081.

contractual liability to be one of near-constitutional significance. As we have argued above, states, pursuant to a multistate bargain, might agree to hear sister-state claims lacking an alternative forum, while reserving a public policy exception. But any public policy exception to this limited duty to entertain sister-state claims would itself be limited by notions that certain remedies are constitutionally required.

CONCLUSION

States historically entertained one another's transitory actions as a matter of comity and not obligation. The Court's imposition of a full faith and credit obligation in *Broderick v. Rosner* was more a reflection of the Court's commitment to the enforcement of contractual obligations between the parties than a commitment to the enforcement of public policies among the states themselves. *Hughes v. Fetter*'s later imposition of a more general requirement that states entertain lawsuits that arise under sister-state law is better explained as a decision that maximizes plaintiffs' forum choices, rather than as a decision that maximizes the policies of the states. As such, *Hughes* has little to do with the interstate concerns of full faith and credit, or any other constitutional principle. Moreover, as we have argued, *Hughes*'s nondiscrimination rationale fits poorly with states' allowable preferences for enforcement of their own laws, full faith and credit notwithstanding. And finally, we conclude that arguments that courts should extend nondiscrimination norms as to the law of other sovereigns should stand or fall on their own merits, without reliance on *Hughes*.