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Introduction

In the common law system, res judicata doctrine embodies the principle that litigation must end somewhere – a principle that significantly increases the value of law and of the court system. Every common law jurisdiction recognizes res judicata in some form, but the precise scope of the doctrine varies across jurisdictions. Indeed, with the tendency of many commentators and courts to substitute the terms "claim preclusion" and "issue preclusion" for the more traditional res judicata and collateral estoppel, even the language of res judicata varies from jurisdiction to jurisdiction.[1]

Although res judicata assures finality within a jurisdiction, res judicata doctrine does not operate, by its own force, to mandate that the courts of one jurisdiction honor judgments rendered in another. Within the international arena, however, principles of "comity" have long induced courts to honor at least some foreign judgments.[2] And within the United States, the Constitution's Full Faith and Credit Clause[3] commands respect for sister-state judgments. It is only natural, then, that courts, including the United States Su-

1. *See, e.g.*, Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984) (using terms "claim preclusion" and "issue preclusion"); RESTATEMENT (SECOND) OF JUDGMENTS, § 23 introductory n. (1982) (same); ALLAN D. VESTAL, RES JUDICATA/PRECLUSION V-14 to V-15 (1969) (same); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (1981) (same).

2. *See* Hilton v. Guyot, 159 U.S. 113, 228 (1895) (endorsing comity principle but refusing to enforce French judgment because of lack of reciprocity); Johnston v. Compagnie Generale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926) (applying comity principle even in absence of reciprocity).

3. U.S. CONST. art. IV, § 1.

preme Court, have often equated res judicata with full faith and credit. For example, in *Riley v. New York Trust Co.*,[4] the Court wrote that "[b]y the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, [became] a part of national jurisprudence."[5]

Despite these broad pronouncements, the equivalence between res judicata and full faith and credit is not a perfect one. Because finality is at the core of both doctrines, full faith and credit obligations generally track res judicata doctrine. At the margins, however, disparities emerge. Unlike res judicata doctrine, the Full Faith and Credit Clause is focused on harmonizing the often conflicting interests of fifty separate sovereign states. The clause operates both by restricting the right of each state to ignore the judgments of the others and, to a far smaller degree, by restricting the right of each state to ignore the statutes of other states. Because the Full Faith and Credit Clause reflects policies not embodied in state res judicata doctrine, it should not be surprising that, in some instances, full faith and credit doctrine diverges from state res judicata doctrine.

This Article explores the muddy boundaries between state preclusion doctrine and the Full Faith and Credit Clause. The deviation between state doctrine on the one hand and full faith and credit on the other is greatest where the state judgment most closely resembles a legislative edict – a determination that one of the parties to the litigation may not, or must, conduct certain activities in the future. In general, the clause leaves each state great freedom to ignore commands made by the legislatures of other states. As the Supreme Court has written, "the Full Faith and Credit Clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."[6]

By contrast, the Full Faith and Credit Clause generally requires each state to honor the judgments of sister states, despite the resulting intrusion on state sovereign interests. There are two reasons for this disparity in the treatment of judgments and statutes. First, enforcement of sister-state judgments (but not sister-state statutes) promotes the federal interest in finality across the nation. Second, because judgments, unlike statutes, typically adjudicate past behavior rather than proscribing future behavior, a requirement that states enforce sister-state judgments imposes only weak limits on the sovereign power of a state to control behavior within its borders.

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4. 315 U.S. 343 (1942).
5. Riley v. N.Y. Trust Co., 315 U.S. 343, 349 (1942).
6. Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939).

The second of these reasons, however, does not apply when a judgment purports to control post-judgment behavior – as judgments sometimes do. When post-judgment behavior might occur in sister states, the power of those sovereign states to control activity within their borders becomes a counterweight to the general federal interests in finality and uniformity. As a result, the usually automatic rule requiring enforcement of sister-state judgments becomes more flexible, approximating more closely the Court's interpretation of the constitutional requirement that each state give full faith and credit to the "public Acts" of sister states.[7] That is, the Full Faith and Credit Clause does not require enforcement of sister-state judgments that proscribe future behavior. Even though the Full Faith and Credit Clause requires enforcement of sister-state money judgments without inquiry into the merits of the underlying claim, the clause does not require a court to enforce an order of a sister-state court that purports to control behavior occurring after the date of the judgment, whatever the res judicata rules of the state that rendered the judgment.

This thesis provides an explanation for *Baker v. General Motors Corp.*[8] The Supreme Court held that a Missouri court was not required to enforce a Michigan court's injunction purporting to prevent a former General Motors engineer from testifying on behalf of plaintiffs in actions against General Motors around the country.[9] *Baker* generated three separate opinions as a unanimous Supreme Court struggled – with less than complete success – to square its common sense result with existing full faith and credit doctrine.[10]

The implications of the thesis, however, extend beyond cases like *Baker*. Whenever the court of one state issues an injunction against behavior in another state, full faith and credit does not require the second state to enforce the injunction. Of course, full faith and credit does not preclude the second state from enforcing the injunction, and principles of comity might lead the second state to enforce the injunction even without any constitutional compulsion. But where the second state's sovereign interests are threatened by a sister-state injunction, the Constitution does not require enforcement.

The Article starts with an analysis of the historical development of full faith and credit jurisprudence, with an emphasis on the divergence between treatment of statutes and judgments. Part II explores state res judicata law and shows why state res judicata principles mesh imperfectly with the policies behind the Constitution's full faith and credit mandate. Part III demonstrates that the Supreme Court's treatment of foreign judgments has recognized, albeit implicitly, the deficiencies in using state res judicata law as the measure

7. U.S. CONST. art. IV, §1.
8. 522 U.S. 222 (1998).
9. Baker v. Gen. Motors Corp., 522 U.S. 222 (1998).
10. *Id.*

for full faith and credit, and consistently has permitted state courts to ignore prior judgments when those judgments would interfere with the state's ability to control post-judgment behavior within its borders. Part IV turns to the *Baker* case and demonstrates how the analysis developed in the first three parts provides a sounder framework for the Court's decision than do the alternatives advanced in the Court's opinions.

I. Full Faith and Credit: The General Framework

The Full Faith and Credit Clause harmonizes the disparate interests of the several states in two ways. First, the clause sometimes requires a state's courts to apply the law of a sister state to controversies that have not previously been resolved by the courts of any state.[11] Second, the clause constrains the power of a state's courts to consider controversies that the courts of another state have resolved. Early in this century, the first of these constraints appeared as significant as the second. Over the last seventy years, however, the Supreme Court has become far more willing to permit courts to ignore sister-state statutes, but has not significantly relaxed the requirement that courts enforce sister-state judgments. That is, under current law, if one state enacts a statute (or adopts a common law rule) that would, by its terms, bind parties who, in the future would act in, or cause effects in, a second state, the second state is free to ignore that statute or rule.

This section explores the development of this disparate treatment of sister-state statutes and sister-state judgments and begins to explore why the Court has insisted that states accord greater respect to sister-state judgments than to sister-state statutes.

A. Full Faith and Credit to "Public Acts"

Choice-of-law theory has long focused on the appropriate scope of state sovereignty. Joseph Story, the founder of American conflicts theory, concluded first that "every nation possesses an exclusive sovereignty and jurisdiction within its territory" such that its laws "bind directly . . . all persons who are residents within it, . . . and also all contracts made and acts done within it."[12]

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11. Historically, the Supreme Court used either the Full Faith and Credit Clause or the Due Process Clause to constrain the power of a state to apply its own law. Especially in cases involving statutes of a foreign jurisdiction, due process functioned as the primary constraint on choice of law. *See, e.g.*, Home Ins. Co. v. Dick, 281 U.S. 397, 407-10 (1930) (using due process rationale to determine whether Texas statute applied). In recent years, however, the Court has treated the two clauses as imposing nearly identical constraints. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10 (1981) (noting similarity in Court's treatment of both clauses).

12. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 21 (6th ed. 1865).

But Story also believed that "whatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter."[13] In other words, the sovereign power of a state includes the power to adjudicate disputes in accordance with forum law. Story recognized, however, the inherent conflict between these two sovereignties, noting that the "real difficulty is to ascertain, what principles in point of public convenience ought to regulate the conduct of nations on this subject, in regard to each other."[14] That "real difficulty" persists to the present day. Although conflicts theorists have offered a variety of frameworks for accommodating the interests of sovereign states,[15] the accepted wisdom is that in some cases, at least, conflict is inevitable.

In a federal system, one might expect conflicts over the scope of state sovereign power to be resolved at the federal level. Congress, however, has demonstrated little interest in promulgating federal choice-of-law rules.[16] In the absence of legislation, the question is whether the Constitution itself demands any particular accommodation of state interests. At various points, the Supreme Court has looked to one or both of two constitutional provisions to help define the scope of state sovereign power: the Full Faith and Credit Clause and the Due Process Clause.

Whatever the constitutional authority for limiting the power of one state to ignore or subordinate the sovereign power of another, the Supreme Court faces three general alternatives for dealing with the problem: (1) the Court could take a "hands-off" approach to state choice-of-law decisions by concluding that it is for each individual state to determine how much effect to give to sister-state law; (2) the Court could systematically mediate disputes over the

13. *Id.* at 25.

14. *Id.* at 26.

15. The most influential of these frameworks has been governmental interest analysis, which Brainerd Currie originally developed in a series of articles and later collected in a book of essays. *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). Since its inception, interest analysis has been controversial, and the criticism continues. *See, e.g.*, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Alfred Hill, *Governmental Interest and the Conflict of Laws – A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992). Other efforts to accommodate the interests of the various sovereign states include comparative impairment, *see* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963), territorial theory, *see* Laycock, *supra*, at 249, and game-theoretic notions of reciprocity, *see* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 145-89 (1991); Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245, 273-76 (1991).

16. For a discussion of failed efforts to draft federal choice-of-law rules, see ANDREAS F. LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES 469 (2d ed. 1998).

scope of state sovereignty by effectively turning choice-of-law into a branch of constitutional law; or (3) the Court could provide minimal guidance on choice-of law issues by intervening sporadically when it appears that a forum court has gone "too far" in frustrating the sovereign interests of another state.

Over time, the Court has flirted with each approach. During the nineteenth century, the Supreme Court treated questions involving the respect due sister-state laws as mere questions of "comity" between the states. Sister-state law stood, from a constitutional perspective, on the same footing as foreign law, as if the Full Faith and Credit Clause had imposed no limitation on state sovereignty.[17] Even in the century's most famous choice-of-law case, *Dred Scott v. Sandford*,[18] none of the several opinions discussed the Full Faith and Credit Clause as relevant in deciding whether the Missouri courts were obligated to treat Dred Scott as free because his owner had removed him to Illinois, a free state.[19]

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17. Perhaps the most notable example is *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 277 (1839), in which the Court held that contracts made by banks incorporated in sister states were enforceable in Alabama. The actions had been brought in federal court, and the Supreme Court reached its ultimate conclusion by construing Alabama law to permit enforcement of such contracts. In the course of its opinion, however, the Court made clear its understanding that obligations toward sister states were equivalent to obligations toward foreign nations:

> We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue its courts; *and that the same law of comity prevails among the several sovereignties of this Union.* . . .
>
> But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests; the presumption in favor of its adoption can no longer be made.

Id. at 286-87 (emphasis added). The Fourteenth Amendment's Due Process Clause, of course, was not ratified until July 9, 1868, and could not, therefore, have served as a limitation on state power for most of the 19th century.

18. 60 U.S. (19 How.) 393 (1856).

19. Chief Justice Taney's opinion for the Court made no mention of full faith and credit, but relied principally on an earlier case. In *Strader v. Graham*, 51 U.S. (10 How.) 82, 94 (1850), the Court had held that it lacked jurisdiction to entertain an appeal from a Kentucky court's determination that slaves who had traveled to Ohio had not acquired their freedom. In an opinion by Chief Justice Taney, the Court held that the case raised questions only of local law, not of constitutional law. *Id.*

Justice Nelson's concurring opinion in the *Dred Scott* case, which treated the choice-of-law issue more extensively, wrote as if the several states bore no more responsibility to respect the statutes of another than do independent nations: "[W]hatever force or effect the laws of one State or nation may have in the territories of another, must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1856) (Nelson, J., concurring). Justice Nelson went on to suggest that when one state does recognize the law of another, "[t]he recognition is purely from comity, and not from any absolute or paramount obligation." *Id.*

The nineteenth century approach was not without support in the constitutional history of the Full Faith and Credit Clause. The principal concern of the framers was with debtors who sought to escape their debts by moving from state to state.[20] Without some constitutional limitation, each of the sovereign states would be free to ignore judgments of the other, subject only to principles of "comity." Some restriction on the sovereign power of individual states to ignore sister-state judgments was necessary to create a workable union. To address this problem, even the Articles of Confederation included a provision requiring each state to give full faith and credit to the judgments of the others.[21] The Constitution's framers built on the Articles, but included language requiring the states to give full faith and credit not only to judgments, but also to the "public Acts" of sister states.[22] The reference to "public Acts," it appears, was intended to assure that the states would respect each other's "acts of insolvency," the bankruptcy determinations of the period.[23] Nothing in the debates suggest that the framers considered the effect each state would be required to give to the statutes of another state.[24] Moreover, because the states had not developed independent systems of common law, there was little reason to consider whether each state should give effect to sister-states' common law doctrines.

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20. The preamble to a 1774 Massachusetts statute permitting creditors to bring an action of debt on a judgment of a neighboring colony read as follows:

> Whereas it frequently happens that persons against whom judgments of court are recovered in the neighboring governments remove with their effects into this province without having paid or satisfied such judgment . . . and it has been made a doubt whether, by law, such judgment can be admitted as sufficient evidence of such judgments, whereby honest creditors are often defrauded of their just demands by negligent and evil-minded debtors. . . .

5 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 323 (1996), *reprinted in* Kurt Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 40 (1957).

21. The provision in the Articles of Confederation reads:

> That 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, and that an Action of Debt may lie in the Court of Law in any State for the Recovery of a Debt due on Judgment of any Court in any other State . . . .

9 JOURNALS OF THE CONTINENTAL CONGRESS 887 (Ford ed. 1907). Note that this provision speaks only of the "Acts . . . of the Courts and Magistrates" but does not refer to any other public Acts.

22. U.S. CONST. art. IV, § 1. *See generally* Nadelmann, *supra* note 20, at 54-55.

23. Nadelmann, *supra* note 20, at 54-55.

24. *But see* Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 95 (1984) (indicating that "parallel treatment of judgments and legislative acts is evident").

Nevertheless, by the early twentieth century, the Supreme Court's full faith and credit jurisprudence had undergone significant change. The regime came perilously close to complete constitutionalization of choice of law.[25] Moreover, now at the height of substantive due process jurisprudence, the Court held that the Due Process Clause, as well as the Full Faith and Credit Clause, operated to restrict a state court's power to apply forum state law.[26]

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25. This change is traceable to at least two doctrinal sources. First, in a series of diversity cases that reached the Supreme Court from the lower federal courts, the Court, principally through Justice Holmes, embraced the "vested rights" theory of choice of law in terms that made it appear, as a matter of logic, that only one state's law could apply to any dispute. *See, e.g.*, Cuba R.R. Co. v. Crosby, 222 U.S. 473, 478 (1912) (noting that when action is brought upon cause arising outside jurisdiction, duty of court is to enforce obligation that has been created by different law); Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126-29 (1904) (finding it unjust to allow plaintiffs to rely solely on foreign law as foundation for his case and still deny defendant benefit of limitations on his liability that law would impose). Second, in a number of cases involving artificial persons, such as corporations and receivers, the Court, in order to prevent state courts from evading their obligation to accord full faith and credit to sister-state judgments, held that each state must honor sister-state statutes endowing artificial persons with legal rights, particularly the right to bring suit. *See, e.g.*, Converse v. Hamilton, 224 U.S. 243, 260 (1912) (holding that receiver can sue in foreign jurisdiction). From these cases, it was but a short step to holding, as the court did in *New York Life Insurance v. Head*, 234 U.S. 149 (1914), and *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915), that the Full Faith and Credit Clause could require the forum state to apply the laws of a sister state. In each case, the Court treated as "settled," *see Supreme Council*, 237 U.S. at 545, or "obvious," *see New York Life*, 234 U.S. at 161, the principle that the Full Faith and Credit Clause limits the forum state's power to apply forum law in forum courts.

26. Indeed, by 1918 it appeared as if the Court effectively had constitutionalized all choice-of-law questions. In *New York Life Insurance Co. v. Dodge*, 246 U.S. 357 (1918), the Court held that a Missouri court could not constitutionally apply to a Missouri resident a Missouri statute requiring that the cash value of an insurance policy be applied to pay premiums necessary to reinstate a lapsed insurance policy. The Missouri insured had applied to the insurance company for a loan, offering the policy as security. Because the insurance company approved the loan agreement at its home office in New York, the Court held that only New York law – which held that the cash value of the policy should be applied first to satisfy the loan obligation – could constitutionally be applied to determine the rights of insured and insurer.

Conversely, in *Mutual Life Insurance Co. of New York v. Liebing*, 259 U.S. 209 (1922), decided four years later, the Court held that when a Missouri insurance policy expressly entitles the insured to a loan from a New York insurer, the Missouri courts were entitled to (and perhaps obligated to) apply the Missouri statute because either: (a) the contract between the parties was complete when the insurer's Missouri representative accepted the loan application, or (b) acceptance took place when the check was delivered to the insured. Both of those events took place in Missouri. As a result, according to Justice Holmes, "the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act." *Id.* at 214. In *Dodge*, the Court relied on the Due Process Clause to reach its constitutional conclusion; in *Liebing*, the Court found it unnecessary to pinpoint any constitutional provision to support its conclusion; in *Aetna Life Insurance Co. v. Dunken*, 266 U.S. 389 (1924), the Court upheld a challenge to the Texas courts' application of Texas law to a contract made in Tennessee when the challenge was founded both on the Full Faith and Credit Clause and "the several clauses of § 1 of the Fourteenth Amendment." *Id.* at 393.

The constitutionalization of choice-of-law, however, was short-lived. Led by Justice Stone, the Court quickly retreated from the position it had recently taken.[27] In *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[28] the Court made it clear that more than one state might constitutionally apply its law to the same set of facts:

> [W]e think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.[29]

Since that time, the Court rarely has overturned a court's decision to apply forum law.[30] So long as the forum state has an "interest" in applying its own law, the forum is free to do so, whatever the effect on the sovereign interests

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The notion that one, and only one, law could constitutionally be applied to a particular set of facts extended beyond contract cases. In *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), the Court held that the Full Faith and Credit Clause obligated a New Hampshire federal court to apply Vermont's workmen's compensation statute, which precluded common law tort recovery, to bar recovery by a Vermont employee injured in New Hampshire. The Court never adequately explained, however, why on the facts of the case, the Vermont statute, rather than New Hampshire's common law rule, should be applicable. The Court merely noted that the injured worker was a resident of Vermont and that "[t]he interest of New Hampshire was only casual." *Id.* at 162.

27. Justice Stone never joined the Court's opinion in *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), writing of the Full Faith and Credit Clause:

> I can find nothing in the history of the full faith and credit clause, or the decisions under it, which lends support to the view that it compels any state to subordinate its domestic policy, with respect to persons and their acts within its borders, to the laws of any other. On the contrary, I think it should be interpreted as leaving the courts of New Hampshire free, in the circumstances now presented, either to apply or refuse to apply the law of Vermont, in accordance with their own interpretation of New Hampshire policy and law.

Id. at 164-65 (Stone, J., concurring).

28. 306 U.S. 493 (1939).

29. Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939).

30. The two exceptions are *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586 (1947) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The *Wolfe* case (decided two years after Justice Stone's death) represented an application of the then-established principle that only the law of the state of incorporation could control the relationship between a fraternal benefit corporation and its members. *See Wolfe*, 331 U.S. at 625. The *Shutts* case held that the Kansas courts could not apply Kansas law to determine the interest lessees were obligated to pay landowners in Oklahoma, Texas, and Louisiana, on royalty payments lessees had delayed pending final approval of rate increases from the Federal Power Commission. *See Shutts*, 472 U.S. at 822. Three years later, however, in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), the Court limited the effect of *Shutts* by upholding a decision by the Kansas courts applying the laws of Oklahoma, Texas, and Louisiana after concluding, despite some evidence to the contrary, that those laws were identical to the law of Kansas. *Id* at 729.

of other states.[31] In effect, the state may ignore sister-state law whenever it has a reasonable basis for doing so.

B. Full Faith and Credit to Judgments

1. The Doctrine

Although a forum court largely is free to ignore sister-state law, once a sister state has rendered a judgment (often based on its own law), the Full Faith and Credit Clause – together with the implementing statute[32] – generally

31. The Court's most complete articulation of the principle that an interested forum may apply its own law appeared in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981): "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13. Justice Stevens's concurring opinion suggested a different approach to the problem, one that focused not on the existence of a forum state interest, but on the extent to which application of forum law would interfere with the sovereign interests of other states: "[I]n my opinion, the [Full Faith and Credit] Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State." *Id.* at 323 (Stevens, J., concurring). Justice Stevens, however, has not found any cases to come before the Court in which the forum's choice of its own law would unjustifiably infringe on the interests of another state. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (finding that Kansas did not violate Full Faith and Credit Clause by applying its own statute of limitations); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 824 (1985) (Stevens, J., dissenting in part) (concluding that Full Faith and Credit Clause did not require Kansas to apply law of another state, and Fourteenth Amendment's Due Process Clause did not prevent Kansas from applying its own law).

32. The second sentence of Article IV, § 1, of the federal Constitution, sometimes called the Effects Clause, provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Congress has enacted a full faith and credit statute, 28 U.S.C. § 1738 (1994), to implement the Full Faith and Credit Clause. The implementing statute goes beyond the constitutional mandate, not only requiring that judgments rendered in one state be honored in other states, but also requiring that federal courts in each state honor state court judgments rendered in the same state, and that state courts honor federal judgments rendered in the same state. *Id.*

Whether Congress can, by statute, reduce the credit due a sister state judgment is a matter of some controversy. Until enactment of the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (Supp. IV 1998), Congress had never attempted to authorize courts to ignore sister state judgments. DOMA, however, provides that states need not honor same sex marriages recognized in sister states. *Id.* For a thoughtful evaluation of Congressional power to limit the credit due a sister state judgment, see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1999-2007 (1997) (ultimately concluding that Congress lacks power to do so). *See also* Mark Strasser, Baker *and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 316-318 (1998) (stating "that the Full Faith and Credit Clause empowers Congress to increase but not to decrease the full faith and credit due to sister states' judicial proceedings"). *But see* Patrick J. Borchers, Baker v. General Motors*: Implications for Inter Jurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 183-84 (1998) (predicting that DOMA will be upheld).

requires the courts of every other state to honor that judgment, no matter how much the judgment intrudes on the forum state's sovereign interests. Of course, in many cases, enforcement of sister-state judgments requires no significant subordination of local sovereignty; the law of the two states will often be the same or substantially similar. But even when a sister state has rendered a judgment based on legal principles inconsistent with those applicable in the forum state, *Fauntleroy v. Lum*[33] establishes that the full faith and credit obligation requires the forum state to enforce the judgment.[34]

In *Fauntleroy,* Mississippi had criminalized certain types of gambling in futures and had withdrawn from its courts the power to enforce agreements made in violation of the criminal statute. Two Mississippi parties entered into a cotton futures contract. When a dispute over performance arose, the parties submitted it to arbitrators who rendered an award. The prevailing party then sought to enforce the award in Missouri, which imposed no comparable prohibition on futures contracts. When the Missouri courts rendered a judgment on the award, the prevailing party then returned to Mississippi to enforce the award. The Mississippi courts refused, concluding that

> the Missouri judgment was not required, under the due faith and credit clause, to be enforced in Mississippi, as it concerned transactions which had taken place exclusively in Mississippi, between residents of that State, which were in violation of laws embodying the public policy of that State, and to give effect to which would be enforcing transactions which the courts of Mississippi had no authority to enforce.[35]

In an opinion by Justice Holmes, the Supreme Court reversed, holding that so long as the Missouri judgment was final in Missouri, the Mississippi courts were bound to enforce it, even if the Missouri judgment rested upon "a misapprehension of the Mississippi law."[36] That is, even though Mississippi law criminalized the futures trading at issue and the futures trading was conducted within Mississippi by Mississippi parties, the Mississippi court was required to subordinate its interest in the transaction in the face of a Missouri judgment.

The *Fauntleroy* principle – that a judgment conclusive in one state is conclusive in all, regardless of the intrusion on state sovereignty – has become entrenched in full faith and credit jurisprudence. Thus, in *Yarborough v. Yarborough,*[37] the Court held that a Georgia judgment extinguishing a father's

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33. 210 U.S. 230 (1908).
34. Fauntleroy v. Lum, 210 U.S. 230 (1908).
35. *Id.* at 239 (White, J., dissenting).
36. *Id.* at 237.
37. 290 U.S. 202 (1933).

obligation to support his daughter precluded the South Carolina courts from awarding the daughter additional support – even though the daughter now resided in South Carolina.[38] And in *Williams v. North Carolina,*[39] the Court held that if one party to a marriage had established a domicile in Nevada and obtained a divorce judgment in that state on grounds not recognized in North Carolina, the state of matrimonial domicile, North Carolina could not prosecute that party for bigamy when he returned to the state.[40] Justice Douglas, citing *Fauntleroy,* wrote that "even though the cause of action could not be entertained in the state of the forum . . . because it . . . contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit."[41]

Indeed, the Court has applied the principle not merely to preclude sister states from revisiting issues resolved by a prior judgment, but also to preclude the federal courts from implementing Congressionally-enacted policies. For instance, § 1983 of the Civil Rights Act was enacted, in part, to respond to the failure of state courts to protect citizens against constitutional violations by state officials. Enactment of the federal statute provided victims with a new avenue of redress: The federal courts. Nevertheless, in *Allen v. McCurry,*[42] the Supreme Court held that once a state court, in a pretrial suppression hearing, determines that a police search did not violate the Fourth Amendment, the victim of the search may not challenge the search's constitutionality in a section 1983 action in federal court.[43] Thus, even when federal policy is based, in part, on mistrust of state processes, a state court judgment generally operates to bar federal relief.[44]

2. Why Require Such Deference to Judgments?

The Supreme Court has sometimes invoked a national interest in uniformity as a justification for requiring a forum court to subordinate its own

38. Yarborough v. Yarborough, 290 U.S. 202 (1933).

39. 317 U.S. 287 (1942).

40. Williams v. N.C., 317 U.S. 287 (1942).

41. *Id.* at 294.

42. 449 U.S. 90 (1980).

43. Allen v. McCurry, 449 U.S. 90 (1980). In *Allen,* the state and federal proceedings occurred in the same state. As a result, the case involved not the Full Faith and Credit Clause, but the implementing statute which requires that "the judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State." 28 U.S.C. § 1738 (1994).

44. *See also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 386 (1996) (holding that federal courts were precluded from entertaining federal action because judicially-approved settlement of Delaware state court class action included release of federal securities act claims).

policies in the face of a conflicting judgment. Thus, in *Williams v. North Carolina*, Justice Douglas emphasized the evils associated with a rule that would permit children to be "bastards in one state but legitimate in the other" and explained that the Constitution "brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause."[45] Similarly, in *Milwaukee County v. M. E. White Co.*,[46] the Court, in holding that an Illinois federal court was obligated to enforce a Wisconsin judgment for income tax due, emphasized that the purpose of the Full Faith and Credit Clause – to make the several states "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of origin" – required the court to subordinate "local policy."[47]

A supposed national interest in uniformity, however, provides an incomplete justification for Full Faith and Credit Clause doctrine. If assuring uniformity of personal obligations across the country was a matter of paramount national importance, one would expect uniformity of obligation to be equally important before and after judgment; that is, if national uniformity requires Wisconsin to enforce an Illinois judgment for breach of contract, should it not also require Wisconsin to enforce a contract enforceable in Illinois? Since the days of *New York Life Insurance Co. v. Dodge*,[48] however, the Supreme Court has been unwilling to take that step; Wisconsin largely is free to ignore Illinois law even if that leaves the promisor bound in Illinois but not in Wisconsin.[49] That is, until an obligation is reduced to judgment, the Supreme Court has been unwilling to mandate national uniformity.

The constitutional requirement that courts enforce sister-state judgments, then, must incorporate a national interest in finality of judgments: Litigation must end somewhere. As the Supreme Court put it in *Stoll v. Gottlieb*,[50] when it held that the Illinois courts were bound by a federal bankruptcy court's determination that it had subject matter jurisdiction:

> It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision . . . merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.[51]

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45. Williams v. N.C., 317 U.S. 287, 300, 302 (1942).
46. 296 U.S. 268 (1935).
47. Milwaukee County v. M.E. White Co., 296 U.S. 268, 277 (1935).
48. 246 U.S. 357 (1918).
49. N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).
50. 305 U.S. 165 (1938).
51. Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

Like uniformity, however, finality by itself provides an incomplete justification for full faith and credit doctrine. The Constitution does not prevent a state from permitting collateral attack on its own court's judgments. But once the judgment is final within a state, the Full Faith and Credit Clause generally requires that the judgment be accorded the same effect in all states.

II. Full Faith and Credit and the Law of Judgments

Full faith and credit doctrine treats statutes and judgments quite differently: The Constitution requires enforcement of sister-state judgments while giving the states considerable latitude to ignore sister-state statutes. State courts are not, however, required to honor every aspect of sister-state judgments. Judgments impose legal obligations in a variety of ways. A judgment resolves existing disputes between parties and also creates legal rules that govern subsequent cases and enable planning for the future. Within each state, local doctrines of stare decisis and res judicata determine the effect of a judgment on courts deciding subsequent cases. The scope of those doctrines is determined by state law.

State law, however, cannot resolve all questions of interstate preclusion. Because state law is not uniform across the country, full faith and credit cannot simply incorporate state res judicata principles; at the very least, federal constitutional law would have to determine which state's res judicata principles determine the deference a court must give to a sister-state judgment. This section explains why the federal role in full faith and credit jurisprudence must be broader than choosing among state res judicata doctrines, and explores how federal law limits the interstate effect of final state judgments when those judgments would interfere with a sister state's ability to control behavior within its borders.

A. How Do Judgments Bind: Stare Decisis and Res Judicata

Judgments bind in at least two ways, captured, in general terms, by the familiar doctrines of stare decisis and res judicata.[52] Suppose, for instance, a Connecticut auto accident victim were to file a complaint in New York alleging that a New York social host was liable for the victim's injuries because the social host had served the negligent driver when the driver was already intoxicated. Suppose further that the New York Court of Appeals were to issue an opinion affirming judgments by lower state courts dismissing the complaint, and holding that the complaint failed to state a claim. The

52. Stare decisis and res judicata are different facets of the interaction among decided cases. Each doctrine reflects the truth that previously decided cases affect the decisions in subsequent cases. *See generally* VESTAL, *supra* note 1, at V-3 to V-7.

judgment would be binding on the same victim if she later tried to sue the same host for the same injuries (res judicata) but, within New York, the decision of the Court of Appeals would also preclude suit by other victims of drunk driving against other social hosts (stare decisis).

The Court of Appeals determination would bind not merely the New York courts, but also the courts of other states – including Connecticut – with respect to future claims by the same victim against the same social host. That is, the Full Faith and Credit Clause generally requires that courts accord res judicata effect to sister-state judgments. As the Supreme Court has put it, "[b]y the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, became a part of national jurisprudence."[53] By contrast, however, the Court of Appeals determination would not preclude a Connecticut court from awarding a judgment to a different accident victim against a different social host (or even a different accident victim against the same social host). That is because the Full Faith and Credit Clause generally does not require that courts accord stare decisis effect to sister-state judgments. The distinction between stare decisis and res judicata, then, provides a reasonable "first cut" at the effect of judgments for full faith and credit purposes.[54]

B. Full Faith and Credit: The Respective Roles of State and Federal Law

Res judicata is primarily a state law doctrine.[55] The Supreme Court has said, on a number of occasions, that in examining a sister-state judgment for full faith and credit purposes, a court must give the judgment the res judicata effect the judgment would have in the state where rendered.[56] Thoughtful

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53. Riley v. N.Y. Trust Co., 315 U.S. 343, 349 (1942); *see also* Durfee v. Duke, 375 U.S. 106, 109 (1963) ("Full faith and credit . . . generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.").

54. *See* Katherine C. Pearson, *Common Law Preclusion, Full Faith and Credit, and Consent Judgments: The Analytical Challenge*, 48 CATH. U. L. REV. 419, 446-47 (1999) (distinguishing between preclusion by judgment and use of judgments as precedent, and noting that full faith and credit has only minimal impact on application of stare decisis doctrine); *see also id.* at 468 ("Full faith and credit has never been used as a means to mandate controlling precedent from jurisdiction to jurisdiction.").

55. Although res judicata doctrine developed primarily at common law – which is largely state law – res judicata is of course relevant with respect to federal court judgments as well. The divergence between federal res judicata doctrine and the doctrines applied in the various states has spawned significant literature. The classic work is Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976). More recent works include Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945 (1998) and Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986).

56. *See, e.g.*, Riley v. N.Y. Trust Co., 315 U.S. 343, 349 (1942). In a number of recent cases, the Court has invoked the principle to require federal courts to apply the res judicata rules

commentators have endorsed the same approach – sometimes observing that it is in the state where the first judgment is rendered that res judicata has its greatest effect on the behavior of parties and their lawyers.[57]

On closer examination, however, this approach is problematic. State res judicata doctrine is often shaped by matters entirely irrelevant to full faith and credit objectives. Thus, if a state has a particularly robust conception of stare decisis, the state may have a narrower conception of res judicata. As a matter of state law, courts are bound both by the stare decisis and res judicata effect of prior judgments. As a result, there is little reason for state courts to insist on rigid separation between the two doctrines. And, indeed, state courts sometimes blur distinctions between the two.

For instance, plaintiffs in a series of New York cases have challenged state rules governing eligibility for public benefits[58] or mandates that mental patients take antipsychotic medication.[59] In each of these cases, the plaintiffs sought class action certification to assure that, under res judicata principles, the state would be bound to afford the same relief to similarly situated persons. In each case, however, the Court of Appeals held that class certification would be unnecessary because "application of the principles of *stare decisis* will adequately protect subsequent litigants."[60] That is, in the court's view, stare decisis protection served as an adequate substitute for res judicata protection, making it unnecessary to enable similarly situated persons to obtain res judicata protection.

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of the state in which the initial judgment was rendered. *See, e.g.*, Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996) (invoking principle that federal courts must accept rules chosen by state from which judgment is taken); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 381-82 (1985) (same); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481-82 (1982) (same).

57. *See* Degnan, *supra* note 55, at 755-73 (arguing that federal law should govern preclusive effects of federal proceedings adjudicating matters of state substantive law); Erichson, *supra* note 55, at 949-63 (arguing that preclusion law of rendering jurisdiction should govern preclusive effect of judgment). Professor Burbank would instead apply state preclusion law on state claims that arise in the federal courts (unless such preclusion law would be hostile to or inconsistent with federal policies) and federal preclusion law on federal claims arising in state courts. *See* Burbank, *supra* note 55, at 805-17, 830 (arguing that state preclusion law should apply to state claims arising in federal courts and federal preclusion law should apply to federal claims arising in state courts).

58. *See* Martin v. Lavine, 346 N.E.2d 794, 794 (N.Y. 1976) (challenging medical assistance payments); Jones v. Berman, 332 N.E.2d 303, 305 (N.Y. 1975) (challenging emergency assistance).

59. *See* Rivers v. Katz, 495 N.E.2d 337, 339 (N.Y. 1986) (deciding "under what circumstances the State may forcibly administer antipsychotic drugs to a mentally ill patient who has been involuntarily confined to a State facility").

60. *Id.* at 345; *see also* Martin v. Lavine, 346 N.E.2d 794, 796 (N.Y. 1976) (noting that class action relief not necessary where principles of stare decisis adequately will protect subsequent petitioners); Jones v. Berman, 332 N.E.2d 303, 371 (N.Y. 1975) (same).

With respect to actions in the New York courts, of course, the Court of Appeals is right. So long as that court announces that future litigants will be bound to the same rules, it makes little difference to the litigants whether they are bound by one doctrine or the other. Hence, there is little reason for the Court of Appeals, in deciding a particular case, to focus on the differences between res judicata and stare decisis. Indeed, a particular state court could, as a matter of state law, develop a stare decisis doctrine so rigid that res judicata principles would become almost superfluous.

By contrast, another state could achieve a nearly identical result by certifying classes more readily and using the res judicata label to assure that its judgments are binding with respect to a broader range of issues and parties. For domestic state law purposes, it would make little difference which approach the court took.[61] Yet if full faith and credit doctrine requires sister states to give judgments the same res judicata effect they have in the state where rendered, the extraterritorial effects of equivalent judgments would be vastly different. For this reason, it makes little sense for full faith and credit analysis to rely entirely on state law conceptions of res judicata: The constitutional effect of a judgment should not depend on the label a state court attaches to the doctrine that makes the judgment binding. If res judicata is to be the talisman for full faith and credit analysis, there must be some core, federally defined conception of res judicata, and state law rules that fall outside that core need not be respected in sister states.

And, indeed, established doctrine permits courts to look beyond the res judicata principles of the state in which a judgment is rendered. Consider *Thomas v. Washington Gas Light Co.*[62] An injured employee recovered a workers' compensation award in Virginia. Under the law of that state, the award was res judicata, precluding further recovery in any administrative or judicial forum. The employee then sought and was awarded additional compensation in the District of Columbia. The Supreme Court rejected the employer's claim that the subsequent award denied full faith and credit to the Virginia determination. In doing so, the Court's plurality opinion made two points. First, Virginia's courts did not have power to determine for them-

61. At the extreme, the New York Court of Appeals could announce that it will henceforth subsume all of New York's stare decisis principles under the res judicata heading. Absent a state statute, nothing prevents the Court of Appeals from taking such an approach; the court has not changed New York's domestic law at all, except to substitute one label for another.

62. *See* Thomas v. Wash. Gas Light Co., 448 U.S. 261 (1980) (holding that "a State has no legitimate interest within the context of our federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its workmen's compensation law in the first instance. The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards.").

selves the extraterritorial effect of their own judgments.[63] That is, if Virginia were to adopt, under the banner of res judicata, a principle that its workers' compensation awards are preclusive within but not without the state's borders, that principle would not be binding for full faith and credit purposes.[64] Second, just because Virginia's award is final and binding within the state does not mean that the award precludes a supplementary award outside the state.[65] Instead of concluding that the award's preclusive effect outside of Virginia finally was determined by the award's effect within Virginia, the Court conducted an analysis of the competing interests of Virginia and the District of Columbia.[66]

I do not mean to endorse the plurality's analysis in *Thomas*. Indeed, I have questioned its wisdom elsewhere.[67] But this much the plurality established and established correctly: States are limited in their power to determine the extraterritorial effects of their judgments. Indeed, the Court, although fragmented on other issues, was virtually unanimous on that point.[68]

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63. *Id.* at 270, 272, 282-83 (noting that rule in *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947), permitted state to determine "extraterritorial effect" of its workmen's compensation awards, but later rejecting *McCartin* rule as unworkable within Constitutional framework and stating that Industrial Commission of Virginia, although correctly establishing all of petitioner's rights in Virginia, did not have authority to determine petitioner's rights in District of Columbia).

64. *See id.* at 283 (stating that there should be no objection to court proceeding in District of Columbia concerning petitioner's rights there because no determination about those rights was made in Virginia by Virginia authorities).

65. *Id.* at 284.

66. *See id.* at 277-86 (discussing three state interests involved in possible conflict between Virginia and District of Columbia over successive workmen's compensation awards: Virginia's interest in limiting liability of companies that conduct business within its borders; Virginia's and District of Columbia's interest in welfare of employee; and Virginia's interest in having its determination of disputes respected by other jurisdictions).

67. *See* Stewart E. Sterk, *Full Faith and Credit, More or Less, to Judgments: Doubts About* Thomas v. Washington Gas Light Co., 69 GEO. L.J. 1329, 1359-60 (1981) (criticizing *Thomas* decision for failing to satisfactorily answer Full Faith and Credit Clause questions raised in opinion, for its "unprecedented" use of analysis of state interests in Full Faith and Credit Clause context, and for attempting to distinguish between court judgment and administrative determinations).

68. *See* Thomas v. Wash. Gas Light Co., 448 U.S. 261, 271-72 (1980) (explaining that plurality opinion rejects *McCartin* rule and provides rule that "represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions"); *id.* at 289 (White, J., concurring) (noting that although *McCartin* rests on "questionable foundations," he is not ready to overrule it); *id.* at 291 (Rehnquist, J., dissenting) (expressing his complete agreement with rejection of *McCartin* rule); Indus. Comm'n v. McCartin, 330 U.S. 622, 628-30 (1947) (concluding that worker's compensation award would preclude recovery in sister state only if award or state legislation used "unmistakable language" to express intention that award precludes additional recovery in sister states).

Other illustrations establish that state res judicata law furnishes an inadequate measure of full faith and credit obligations. Consider a judicial determination that a state court lacks subject matter jurisdiction, or that the statute of limitations has expired, or that the state's public policy requires the court to "close its doors" to a particular dispute. In each case, the determination is res judicata within the state. If, after dismissal, the plaintiff brought another action on the same claim, the state's courts would dismiss on res judicata grounds. But if the plaintiff proceeded in another state, full faith and credit doctrine would not bar the action; the second state would be free to consider plaintiff's claim unconstrained by the prior determination.

That res judicata law furnishes an incomplete measure of a court's full faith and credit obligations should not be surprising. Res judicata is not a constitutional doctrine. Rather, it is for the most part a state law doctrine tied heavily to state procedures. At the same time, a state's res judicata doctrine may reflect strong state policy judgments not shared by other states.

Full faith and credit, by contrast, is a federal constitutional doctrine designed to unify the states into a nation.[69] That constitutional purpose is typically advanced by requiring a judgment binding in one state to be binding in all. As a result, full faith and credit doctrine generally incorporates state res judicata doctrine. But it would be inaccurate to elevate this general tendency into an immutable rule. Full faith and credit doctrine incorporates state res judicata rules not because the rules are inherently inviolate or because the language of the Constitution or the federal statute makes them so. Instead, full faith and credit doctrine incorporates state res judicata rules because doing so generally promotes the constitutional interest in national unity. On the other hand, when incorporating state res judicata rules would generate too great a threat to the sovereignty of a sister state the rules must yield.

Thus, in *Fall v. Eastin,*[70] the Court held that the Full Faith and Credit Clause did not require the Nebraska courts, in a quiet title action, to honor a deed to Nebraska land executed pursuant to a Washington decree directing that the husband convey the land to his wife.[71] Brainerd Currie, for one, suggested that the result protected Nebraska's sovereign interest in maintaining secure land titles.[72] And, in a number of cases, the Court has been unwilling

69. *See* Sherrer v. Sherrer, 334 U.S. 343, 355 (1948) (noting that Full Faith and Credit Clause was "incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation").

70. 215 U.S. 1 (1909).

71. *See* Fall v. Eastin, 215 U.S. 1, 14 (1909) (finding that Nebraska court handling quiet title action involving tract of Nebraska land was not required to recognize deed to land issued pursuant to decree from court in Washington state).

72. Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees,* 21 U. CHI. L. REV. 620, 639-40 (1954). Currie stated:

to hold that the Full Faith and Credit Clause requires enforcement of sister-state child custody decrees.[73] The apparent concern is that limiting a state's discretion to act in a child's best interest represents too significant an intrusion on state sovereignty. And in *Watkins v. Conway*,[74] the Court permitted Georgia to invoke an administrative concern – the desire to avoid stale claims – to avoid enforcement of a Florida judgment still binding in Florida.[75]

C. The Constitutional Balance

The preceding section demonstrates that state res judicata law cannot and does not completely define the full faith and credit obligation of the courts. Instead, federal law must define the full faith and credit obligation. In determining the content of federal constitutional law in this area, the purposes

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> The plight of a Nebraska lawyer examining a title, when he encounters on the record a conveyance by a commissioner appointed by a foreign court, is one which readily arouses sympathetic understanding. His problem, in such a suppositious case, would be to inquire fully into the unfamiliar powers of the foreign court; to examine the record of the proceedings leading to the decree; and perhaps to disentangle nice distinctions under the full faith and credit clause. It may well be said that a state could hardly tolerate such complexities.

Id. at 640.

73. In these cases, the Court has not held that full faith and credit does *not* apply to custody decrees. Instead, the Court has left the question open, concluding that on the facts of the decided cases, the res judicata doctrines of the state in which the initial custody determination was made would have permitted modification. The Court expressly reserved judgment on the scope of the Full Faith and Credit Clause if the initial custody determination would have been deemed final by the courts of that state. Ford v. Ford, 371 U.S. 187, 192 (1962); Kovacs v. Brewer, 356 U.S. 604, 608 (1958); N.Y. *ex rel.* Halvey v. Halvey, 330 U.S. 610, 616 (1947).

In *Kovacs*, Justice Frankfurter, concurring, would have held explicitly that the Full Faith and Credit Clause does not apply to foreign custody decrees. *See Kovacs*, 356 U.S. at 611 (characterizing welfare of child as more important consideration than federal policies in favor of certainty and finality). The New York courts have held expressly that "[t]he full faith and credit clause does not apply to custody decrees." Bachman v. Mejias, 136 N.E.2d 866, 868 (N.Y. 1956).

The issue has become less significant in recent years with adoption of the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 116 (1979), and the federal Parental Kidnapping Protection Act, 28 U.S.C. § 1738A (1999), both of which impose statutory obligations designed to coordinate custody determinations.

74. 385 U.S. 188 (1966).

75. *See* Watkins v. Conway, 385 U.S. 188, 188-89 (1966) (allowing Georgia to refuse enforcement of Florida judgment on ground that claim is stale according to Georgia law but noting that appellant need only return to Florida, revive his judgment, and then return to Georgia and seek enforcement without being under Georgia's five-year statute of limitations for seeking enforcement of foreign judgments). For an earlier case holding that a state may apply its own statute of limitations to a sister-state judgment, see M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327 (1839).

behind the Full Faith and Credit Clause are and should be critical. Section 1 examines those purposes. As Section 2 demonstrates, those purposes will often require deference to state res judicata principles. Section 3, however, demonstrates that when a state judgment purports to control future behavior, deference to state law is inconsistent with full faith and credit policies.

1. The Full Faith and Credit Objective: Coordination of State Finality Policies

Every state has an interest in finality, an interest reflected in its res judicata rules. By assuring the parties to a litigation that the judgment rendered will be final and binding, the state creates incentives for the parties to introduce, in a single litigation, all of the facts and law relevant to resolution of the controversy between the parties.[76] Conversely, without a promise that judicial resolution will be final and binding, some parties might act strategically to withhold facts or arguments, reserving them for a subsequent litigation.[77] For all parties, the prospect of an inconclusive determination would reduce the value of litigation and hence the value of the legal system as a mechanism for dispute resolution. Reducing the value of an important dispute resolution mechanism would, in turn, reduce the incentives to avoid liability-creating behavior. In the ordinary case, these costs far exceed the only discernible advantage of permitting relitigation: The ability of the second court to consider facts and law that, for whatever reason, escaped the attention of the parties or the court in the first proceeding.[78]

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76. *See, e.g.*, Apparel Art Int'l, Inc. v. Amertex Enters., Ltd., 48 F.3d 576, 583 (1st Cir. 1995) (emphasizing that res judicata provides strong incentive for plaintiffs "to plead all factually related allegations and attendant legal theories" in same lawsuit); *see also* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 949-63 (1998) (emphasizing, in context of differences between federal and state res judicata rules, that res judicata's incentives are felt most strongly in jurisdiction where first action is brought).

77. *See, e.g.*, Bailey v. USX Corp., 658 F. Supp. 279, 282-83 (N.D. Ala. 1987) (concluding that plaintiff's retaliation claim against employer who had dismissed him was barred because he did not raise it in conjunction with his sex discrimination claim against same employer). The court observed that plaintiff's silence was "impossible to explain" except on the theory that he "had in mind getting a 'second shot'" at the same defendant. *Id.* at 282. Finally, the court observed that "[t]he public policy represented by *res judicata* is one which demands of a litigant that he present in one suit all of the claims which have a common nexus." *Id.*

78. *See* Pearson, *supra* note 54, at 438 (noting that preclusion rules sometimes work hardship on party who believes that trial decision is wrong). Even as a matter of state law, however, there are instances in which the interest in accurate adjudication outweighs the costs associated with permitting relitigation. Thus, in a New York criminal proceeding, a convicted defendant who discovers compelling evidence of innocence may secure a new trial. *See* N.Y. CRIM. PROC. L. § 440.10(1)(g) (McKinney 1994). In most jurisdictions, awards of child custody and child

One might suppose, then, that the interest in finality – shared by every jurisdiction – would render the Full Faith and Credit Clause unnecessary. That is, why not assume that each state's own interests in finality would lead to uniform preclusion law? The problem is that when an F_2 court permits relitigation of a judgment rendered in F_1, the benefits of relitigation are often felt in F_2, while the costs are felt only in F_1. Consider, for instance, an F_2 court which believes that an F_1 judgment represents a miscarriage of justice (particularly with respect to an F_2 resident adversely affected by the judgment). If the F_2 court were to permit relitigation, much of the supposed benefit of reconsideration would be felt in F_2, where a resident might be free of an onerous burden the F_1 court had imposed. By contrast, if courts are free to determine anew issues previously resolved in F_1, many of the effects – both on primary behavior and on the litigation system – will be felt in F_1, because the potential for relitigation has reduced the value of an F_1 adjudication.

The "comity" doctrine familiar to international law would not adequately deal with the externalities problem.[79] At first glance, one might conclude that self-interest would lead each state to enforce the judgments of other states – that F_2 would not impose external costs on F_1 in order to induce F_1 not to impose external costs on F_2.[80] Two problems, however, would impede development of such a reciprocity regime. First, even if each state would be better off in a regime of reciprocal enforcement, the coordination problems among states might prove insurmountable.[81] Second, even if a regime of reciprocal

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support are modifiable. *See, e.g.*, NEV. REV. STAT. 125.510 (2000) (noting modification of custody awards); NEV. REV. STAT. 125.210 (13) (2000) (noting modification of support awards).

79. In *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), the Supreme Court described comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

Chancellor Kent early established comity doctrine as a principle of American law: "to try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states and would be carrying the doctrine of re-examination to an oppressive extent." Taylor v. Bryden, 8 Johns. 173, 177 (N.Y. Sup. Ct. 1811); *see also* Lazier v. Westcott, 26 N.Y. 146, 147, 154 (1862) (applying comity doctrine to permit enforcement of judgment of "Upper Canada" (Quebec)).

80. Sometimes, of course, a tit-for-tat strategy leads to non-enforcement. Thus, in *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), the United States Supreme Court, after cataloguing the reasons supporting enforcement of foreign judgments, invoked "reciprocity" in declining to enforce a French judgment because French courts would not enforce a comparable American judgment.

81. *Cf.* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 1008-10 (1994) (cataloguing difficulties in establishing regime of reciprocity in choice of law). *But see* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATION AND FUTURE

enforcement would, in the aggregate, generate more gains than losses, some individual states might obtain net benefits by refusing to enforce sister-state judgments.[82] For example, some states might establish themselves as havens for debtors in order to attract certain types of business.[83]

The Full Faith and Credit Clause overcomes these coordination difficulties and limits the power of states to impose externalities by refusing enforcement of sister-state judgments.[84] Full faith and credit vindicates the parallel interest of the several states in affording parties to a dispute a final and binding resolution of that dispute. Although in each individual case, the Full Faith and Credit Clause acts as a constraint on the sovereignty of a state, in the aggregate, the clause enhances state sovereign interests by assuring that important exercises of sovereign power – judgments – will enjoy nationwide force.[85] Without full faith and credit obligations, each judgment would be subject to a measure of second guessing throughout the nation, reducing the value of the legal system as a dispute-resolution mechanism.

The Full Faith and Credit Clause, then, generates net gains for the states[86] as long as the clause imposes only minor constraints on the sover-

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DIRECTIONS 145-189 (1991) (discussing possibilities of obtaining voluntary cooperation among states in establishing optimal choice-of-law regime).

82. *See* Sterk, *supra* note 81, at 1004-05 (observing that if cooperation among states would be efficient in Kaldor-Hicks sense, but would not be Pareto-superior, cooperation is unlikely to occur unless states who gain from cooperation are willing to make cash payments to states who lose).

83. Suppose, for instance, Delaware sought to attract the assets of potential tortfeasors by refusing to enforce foreign tort judgments. Even if foreign states were to retaliate by refusing to enforce Delaware judgments, Delaware and its residents might still be better off. The gains to the state from the new business could easily exceed the losses resulting from the diminished value of Delaware judgments. For a game theory analysis of a comparable problem – involving the incentives for states to attract trust business by permitting potential tortfeasors to create asset protection trusts – see Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1065-74 (2000).

84. Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935). The Court stated:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Id.

85. Justice Robert H. Jackson emphasized that the framers sought "to federalize the separate and independent state legal systems" not to increase federal power at state expense but to avoid" disintegrating influence of provincialism in jurisprudence." Robert H. Jackson, *Full Faith and Credit – The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945).

86. *But see supra* notes 66-67 and accompanying text (noting that by reducing power of each state to impose externalities on others, clause might generate net harms for few states that would lose ability to impose externalities on sister states).

eignty of the individual states. By contrast, if the clause were construed to impose more stringent limitations on state sovereignty, the clause's net impact might even become negative: The gains each state reaps from greater finality of its judgments might be outweighed by diminished ability to control behavior within its borders. The next two sections examine the implications of this insight.

2. *The General Rule: Federal Interests Compel F_2 to Respect F_1's Preclusion Rules*

Full faith and credit policies generally require that the effect of F_1's judgment be uniform throughout the country. That is, F_2 generally must enforce F_1's judgment to the same extent that the judgment would be enforceable in F_1. Departures from F_1's rules would intrude significantly on that state's ability to control litigation procedures in its own courts.[87] Suppose, for instance, F_1 has a procedural rule mandating compulsory counterclaims.[88] The rule precludes a defendant from raising in a subsequent proceeding any claim defendant could have raised as a counterclaim in plaintiff's action. The rule might reflect a policy judgment that litigation will be more efficient, and the results may be more accurate, if all claims arising out of the same controversy are resolved together.[89] By making counterclaims compulsory, F_1 induces defendants to put all of their cards on the table in the initial litigation, rather than waiting to see how the court responds to plaintiff's initial claim. If,

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87. The examples in this paragraph and the next assume that F_1's preclusion rules are more restrictive than those prevailing in F_2. Cases might also arise where the converse is true – where F_2's preclusion rules are more restrictive than F_1's. The issue in such cases is sometimes phrased as whether F_2 may accord *more* faith and credit to F_1's judgment than the judgment would receive in F_1 itself. *See* Hart v. Am. Airlines, 304 N.Y.S.2d 810, 814-15 (N.Y. Sup. Ct. 1969) (noting that defendant protested preclusion of issue of liability on basis that use of Texas verdict in New York case might further harm defendant and arguing that effect of one case involving one plaintiff in Texas will have greater impact in New York). In these cases, too, as in cases where F_1's preclusion rules are more restrictive than F_2's, application of F_2's preclusion rules could subvert F_1's policies and work unfairness to litigants.

88. *See, e.g.*, FED. R. CIV. P. 13(a) (in part):

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom th court cannot acquire jurisdiction.

Id. Many states have adopted compulsory counterclaim rules patterned on Rule 13(a). *See* RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. e (1982).

89. *See, e.g.*, Warshawsky & Co. v. Arcata Nat'l Corp., 552 F.2d 1257, 1261 (7th Cir. 1977) ("The purpose of the rule is to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.").

however, defendant would be free to advance a counterclaim by crossing state lines to sue in F_2, F_1 will have lost the ability to control the conduct of litigation within its borders. In addition, fairness to litigants supports a rule requiring F_2 to apply F_1's preclusion rules.[90] Modern rules permitting liberal discovery are often associated with stringent preclusion rules.[91] That is, under modern rules, plaintiff may be entitled to engage in what more traditional jurisdictions would treat as impermissible "fishing expeditions," but only on the condition that plaintiff advance all related claims in the same action. To permit plaintiff the benefit of F_1's liberal discovery rules, without binding plaintiff to that state's preclusion rules could well be unfair to defendant, who was compelled to produce discovery materials on the understanding that the initial action would dispose of all claims.

Finally, application of F_1's preclusion rules does not intrude significantly on F_2's interests. In the course of rendering judgment, F_1's courts typically determine two kinds of questions: questions of fact and questions of law (which often include applications of law to fact). Honoring F_1's determinations on "pure" fact questions poses little threat to F_2's interests; when fact questions are involved, all states typically have the same interest – learning the truth – even if they search for truth in somewhat different ways.[92] By

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90. *See* Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 312 (1993) (emphasizing not only fairness concerns, but disproportionately large resources that would be invested in initial suit if preclusion principles applied in second forum are uncertain).

91. *See* RESTATEMENT (SECOND) OF JUDGMENTS, Introduction at 10. The *Restatement* states:

> The rules of res judicata in modern procedure . . . may fairly be characterized as illiberal toward the opportunity for relitigation. Their rigor contrasts sharply with the liberality of the rules governing the original event, which is the theme of the Federal Rules of Civil Procedure and similar systems. . . .
>
> This difference does not represent a contradiction or ambivalence in procedural policy. Rather, it reflects the relationship between rules of original procedure and rules of res judicata. Inasmuch as the former are not generally permissive, the latter are correspondingly restrictive.

Id.

92. For example, some courts may be willing to admit parol evidence to explain ambiguous terms in written agreements, while others may insist on discerning meaning from the writing itself. The two groups, however, may differ principally on which of the two rules better enables courts to ascertain the parties' "true" intentions. *See* Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 882 (1999). Hillman stated:

> A judicial preference for rules that favor written contracts, however, does not necessarily mean that courts are less likely to enforce real agreements between parties. After all, if the parties' agreement is indefinite on important terms and the parties disagree about the content of those terms, or if the parties debate whether they even entered into an enforceable agreement, it is not self-evident why enforce-

contrast, when F_1 applies its own law in its courts, enforcing F_1's determination would appear to involve a more significant intrusion on F_2's sovereign interests, especially if F_2 has a close connection to the litigation.

Closer examination reveals, however, that even when F_1 applies its own law, requiring F_2 to enforce the F_1 judgment involves only a limited intrusion on F_2's sovereignty. A party to the F_1 litigation who believes F_2 law should apply can argue either that F_2 law should be applied as a matter of F_1 conflicts law, or that the federal constitution requires application of F_2 law. On the constitutional issue, appeal is available even to the United States Supreme Court. And in those cases in which application of F_1 law would intrude most significantly on F_2's sovereign interests, the Court has indicated that application of F_1 law would be unconstitutional.[93]

In general, then, a preclusion rule requiring F_2 to enforce F_1's judgments on F_1's terms assures that the effect of a judgment will be uniform across the country. The uniformity requirement safeguards F_1's interest in the integrity of its procedural system by reducing the ability of F_2 to impose externalities on F_1. At the same time, requiring F_2 to enforce F_1's judgments on F_1's terms avoids significant intrusion on F_2's sovereign interests.

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ment of a contract more often than not supports the real agreement between the parties.

Id.

93. In general, F_2's sovereign interests would be undermined most seriously when application of F_1 law reduces the likelihood that persons will, in the future, look to F_2 law to guide their behavior. As a matter of choice-of-law doctrine, some courts have tried to capture this distinction by insisting that the law of the place of injury (in tort cases) should apply when the rule involved is a "conduct regulating" rule, while some other state's law might be applicable if the law is a "loss allocating" rule. *See, e.g.*, Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684-85 (N.Y. 1985) (noting that when rule is conduct-regulating, "the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future assume critical importance").

This principle – that a state may not apply its own law when doing so would frustrate the reliance or expectation interests of one of the parties – has found expression in constitutional cases. Thus, in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 317, 318 n.24 (1981), the majority emphasized that defendant Allstate "can hardly claim . . . surprise that the state courts might apply forum law" and indicated expressly that "[t]here is no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law."

Justice Stevens, in his concurrence in *Hague*, stated even more directly that the Full Faith and Credit Clause is designed, in choice of law cases, to protect the sovereign interests of sister states. *Id.* at 322 (Stevens, J., concurring) ("The Full Faith and Credit Clause implements [the constitutional design] by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement on their sovereignty.").

3. Wrinkles in the Rule: Effect of the Judgment on Post-Judgment Activity

The full faith and credit principles outlined in the preceding section are well adapted for the ordinary case in which plaintiff's action against defendant (or against multiple defendants) closes either with a judgment for defendant or with a money judgment for plaintiff. In the ordinary case, the only obligation that survives F_1's judgment is the obligation to pay money (if plaintiff prevails on the claim or defendant prevails on a counterclaim). The F_1 judgment has no effect on F_2's power to control activity within its borders or to control the actions of its residents. At worst, the F_1 judgment might induce parties in F_2 to rely less on F_2 law by highlighting the possibility that a court in F_1 could ignore F_2 law in subsequent litigation. But those cases in which F_1 applies forum law despite a party's justified reliance on F_2 law are the very cases in which an appellate court is most likely to hold application of F_1 law unconstitutional.[94] Hence, in the ordinary case that results in dismissal, or in award of a money judgment, requiring F_2 to enforce F_1's judgment will not affect F_2's ability to regulate conduct within its borders.

The situation is significantly different, however, when F_1's judgment purports to have effects that extend beyond the judgment date. Consider an example. Suppose an Oregon court had adjudicated Debtor a "spendthrift" pursuant to a statute which makes contracts of adjudicated spendthrifts voidable once a court has appointed a guardian on the spendthrift's behalf. Suppose further that Creditor, a California merchant who is unaware of the spendthrift adjudication, extends credit to debtor. When Creditor seeks to recover in Oregon court, the court renders a judgment for Debtor, based on the state's spendthrift statute.[95] The Full Faith and Credit Clause precludes Creditor from recovering on the same debt in California or any other state. Suppose however, the Oregon court were to go one step further and to incorporate in the judgment language precluding Creditor from recovering from Debtor on any future contracts the two might make. What effect would that language produce?

Suppose for instance that three years after the judgment Debtor walks into Creditor's California store and writes a bad check for goods he purchases. California, unlike Oregon, provides no special protection to spendthrifts.

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94. *Cf.* Allstate Ins. Co. v. Hague, 449 U.S. 302, 318 n.24, 320 (1981) (concluding that application of Minnesota law was not unconstitutional, but emphasizing that there is "no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law"); *id.* at 327 (Stevens, J. concurring) ("A choice-of-law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause.").

95. *Cf.* Lilienthal v. Kaufman, 395 P.2d 543, 549 (Or. 1964) (applying Oregon law over California law in order to further Oregon public policy of protecting family of spendthrift).

Creditor wants to bring an action for the purchase price of the goods. If Creditor proceeds in the Oregon courts, the Oregon judgment will preclude recovery. Creditor has no due process right to a hearing on the new contract; the prior judgment, to which he was a party, considered and extinguished all of his rights on any future contract. But suppose Creditor proceeds not in Oregon, but in a California court. Does full faith and credit require the California court to dismiss Creditor's claim?

If nationwide uniformity of result were the only goal, the natural first reaction would be yes. So long as the Oregon judgment is preclusive in Oregon, California courts would be obligated to give the judgment the same effect in California. The answer is not so clear, however, if we return to basic principles.

We have seen that requiring enforcement of sister-state judgments generally coordinates the sovereign interests of the several states.[96] Each state relinquishes one aspect of its sovereign power: The right to adjudicate disputes in which courts of a sister state have already rendered judgment. In return, the state obtains the assurance that its own judgments will enjoy nationwide force. Absent the Full Faith and Credit Clause, each state would have unlimited power to render judgments over persons within the jurisdiction, but that power would be illusory; other states would be free to undermine those judgments by rendering their own, conflicting, judgments. The Full Faith and Credit Clause confers on each state the power to render a judgment that is effective throughout the nation, while simultaneously protecting the parties against the cost of multiple litigations. The tradeoff ultimately enhances the sovereign power of each state.

The calculus is different, however, when the judgment involved purports to prescribe future behavior. If the Full Faith and Credit Clause required enforcement of these judgments, each state would relinquish not merely the power of its courts to render judgments, but also the power of its courts (and legislature) to prescribe and control behavior within the state – a more significant aspect of state sovereignty. Consider, for instance, the effect of our hypothetical Oregon judgment: California would no longer be entitled to prescribe the legal consequences that flow from acts that take place within its borders. That is, no matter how widely the California legislature broadcast its rule that spendthrifts are liable for their debts, indeed, even if the Governor of California expressly told Debtor he would be liable for any purchases he made in Creditor's store, the Oregon judgment would protect Debtor from suit in California court.[97]

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96. *See supra* notes 62-75 accompanying text (emphasizing how res judicata works to benefit sovereign interest of states).

97. One might contend that the California creditor would be protected because the hypothesized Oregon judgment would be unconstitutional. However, appeal of the original Oregon

What corresponding benefits compensate for this loss of control over events within California's borders? In the ordinary case, requiring F_2 to accord an F_1 judgment the same effect the judgment would have in F_1 protects the integrity of F_1's litigation process. If F_2 courts are required to enforce F_1's judgments, the parties have a greater incentive to bring all evidence before the F_1 court; failure to present evidence in F_1 will bar a party from presenting the evidence in any other forum. Hence, the quality of decisionmaking in F_1 will be improved because the F_1 court is more likely to have all relevant evidence before it.

This justification for binding F_2 to F_1's judgments, however, is most persuasive when the F_1 court has made a determination of fact. Fact determinations are time-consuming and generally require inconvenience to non-party witnesses, to judges, and often to juries. Relitigating fact questions would involve considerable expenditure of resources without commensurate gain. But when the F_1 judgment determines the legal consequences of future events, the F_1 court has made no significant fact determination. Instead, the court decides only that if particular facts occur, particular legal consequences will ensue. Hence, there is less reason for concern that permitting the F_2 court to reconsider the issues determined in F_1 will distort the fact finding process in F_1 because the F_1 court, with respect to future events, is not acting as a fact finder. Whether or not the F_1 judgment is entitled to preclusive effect in F_2, the F_2 court will have to make significant fact determinations.

Of course, res judicata principles typically apply to judicial determinations of law as well as to determinations of fact.[98] But the reasons for applying those principles to questions of law are somewhat different. Because determinations of law rarely involve trials, witnesses, or juries, conservation of resources provides a less compelling reason for precluding relitigation of

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judgment provides no meaningful safeguard against the intrusion. At the time the Oregon court rendered its judgment, the potential effects on the sovereignty of other states was highly speculative: Debtor may never seek to contract with Creditor outside the state, and even if he does, Debtor may not do so in a state which denies protection to spendthrifts. In addition, the very existence of the Oregon judgment will make it difficult for Creditor to argue that he was unfairly surprised by a future judgment denying relief on a subsequent contract. Hence, any claim that the Oregon judgment exceeded the constitutional power of the Oregon court is unlikely to succeed – even in the unlikely event that Creditor believed it worthwhile to appeal to preserve such hypothetical interests.

98. When issue preclusion rather than claim preclusion is involved, courts do distinguish between issues of fact and issues of law. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1982) (permitting relitigation of issue in subsequent action when issue is one of law and two actions involve unrelated claims or when necessary to avoid inequitable administration of laws); *see also* VESTAL, *supra* note 1, at V-248 (noting that "[w]hen the law on the point is not well established, the deciding court must face the question of the preclusive effect to be given the earlier decision").

pure questions of law.[99] Instead, judicial determinations of questions of law are preclusive because questions of law are sometimes so intertwined with questions of fact that precluding relitigation of fact questions would be impractical unless preclusion rules also applied to questions of law.[100] In other instances, preclusion on questions of law is necessary to protect parties from harassment by repetitive litigation.[101] Neither of these justifications, however, explains why a judicial determination about the legal effect of events that occur in the future should be binding on the courts of the jurisdiction in which those events occur.

The point, then, is this: If the Full Faith and Credit Clause is designed to coordinate the sovereign interests of the several states, few states would willingly surrender control of events within their borders in order to obtain power to control speculative future events in other states.[102] Power to control future events generally is not necessary to preserve the integrity of F_1's litigation process. The respective interests of the state can be reconciled best by permitting F_2 to regulate events with which it has a significant connection without the constraints of an earlier F_1 judgment rendered before the facts giving rise to dispute have fully unfolded. In effect, an F_1 judgment specifying the legal consequences of future events is much like an F_1 statute, which, as we have seen, F_2 largely would be free to ignore.[103]

III. Full Faith and Credit in Practice: The Limited Power of a Judgment to Control Out-of-State Behavior

Money judgments do not typically purport to create – or to extinguish – liability for events that have not yet occurred. When a plaintiff obtains a money judgment against a defendant, the judgment compensates the plaintiff

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99. In addition, unless law in a particular area is uncertain, traditional application of stare decisis doctrine will make res judicata principles unnecessary. VESTAL, *supra* note 1, at V-246.

100. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. b (1982) (noting "elusive" distinction between issues of fact and issues of law and observing that "the journey from a pure question of fact to a pure question of law is one of subtle gradations rather than one marked by a rigid divide").

101. *See* VESTAL, *supra* note 1, at V-9 (noting that res judicata reduces harassment from additional repetitive litigation); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4403, at 16 (1981) (emphasizing repose for litigants as core value of res judicata).

102. For a few small states, the tradeoff might enhance sovereign power. Because of the relatively few occasions on which courts of other states would have occasion to control behavior within a small state, the small state might prefer a regime in which it retained the power to control a large number of events outside of its borders, even at the cost of losing control over events within its borders. Typically, however, the events each state is most concerned with are events that affect local persons, places, and things.

103. *See supra* Part I.A (explaining that one state may ignore law and acts of sister state).

for actions the defendant has taken in the past; no new obligation is placed on the defendant other than to pay compensation. Similarly, when a court renders judgment for a defendant, the court decides that plaintiff is not entitled to compensation for defendant's past action; the judgment does not prevent plaintiff from seeking recovery for actions defendant might later take. Although the court's judgment (like a statute) may provide the parties with guidance about the effect of possible future behavior, the judgment does not purport to determine finally the consequences of any particular future act.

By contrast, a variety of equitable decrees do purport to require parties to engage in a course of future conduct. Custody determinations and, to a lesser extent, child support determinations, are forward-looking. Injunctions by their very nature command one or more parties to engage in particular behavior. If given extraterritorial effect, then, it is these sorts of equitable decrees that have the greatest potential to intrude on the sovereign interests of other states. This section examines the application of the Full Faith and Credit Clause to these decrees.[104]

A. Child Custody and Support Determinations

1. Custody

Child custody determinations are among the most future-regarding of judicial orders. If a court in one state renders an award of custody to a child's mother and the child then moves to another state, the custody determination, if binding in the second state, would significantly restrict that state from exercising a critical sovereign function – protection of children within the forum's borders.

Today, the problem is governed by federal statute – the Parental Kidnaping Prevention Act (PKPA).[105] But Congress enacted the statute against a background of judicial decisions that bears examination, especially for its implications on full faith and credit problems that have not been resolved definitively by statute. Moreover, the statute itself reflects a concern with protecting the sovereign interests of a state in which a child and its family now reside.

Before enactment of the PKPA, the Supreme Court had never determined whether the courts of a state in which a child had come to reside were obligated to accord full faith and credit to a custody determination made in another state. The Full Faith and Credit Clause never requires the courts of

104. *See also* Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 793-817 (1998) (conducting historical survey of application of Full Faith and Credit Clause to equity decrees).

105. 28 U.S.C. § 1738A (1994).

a second state to give a judgment more effect than the judgment would have in a state where rendered.[106] Therefore, if a custody determination is modifiable in F_1, the courts of F_2 have the same power to modify the judgment that the F_1 courts would enjoy. Because custody determinations generally are modifiable as a matter of state law,[107] F_2 would be entitled to modify an F_1 determination even if the Full Faith and Credit Clause applied with full force to custody determinations. Thus, in *New York ex rel. Halvey v. Halvey*,[108] the Supreme Court held that a New York court was free to modify a Florida custody decree to permit visitation by the father because, under Florida law, custody decrees are not res judicata "except as to the facts before the court at the time of judgment."[109] The Court held that there was "a failure of proof that the Florida decree received less credit in New York than it had in Florida,"[110] making it unnecessary for the court to decide broader questions about the application of full faith and credit to custody decrees.[111]

In *Kovacs v. Brewer*,[112] the Court had another opportunity to hold squarely that the Full Faith and Credit Clause applies to custody decrees, but again the court declined to do so.[113] A New York court had awarded custody to the child's mother, relying in part on findings that the child's paternal grandfather was ill.[114] The grandfather, who at the time lived with the child in North Carolina, refused to surrender the child, leading the mother to bring an action in North Carolina to secure the child.[115] After a hearing, the North Carolina court awarded custody to the grandfather, concluding that the grandfather had required no medical care for the preceding year and that another relative recently had moved from the grandfather's home permitting the

106. *See* N.Y. *ex rel.* Halvey v. Halvey, 330 U.S. 610, 614 ("[A] judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered.").

107. *See, e.g.*, N.C. GEN. STAT. § 50-13.7(a) (1999) (stating modification available upon showing of changed circumstances); *cf.* Grossman v. Meller, 623 N.Y.S.2d 857, 859 (N.Y. App. Div. 1995) (noting that custody decisions are "never final and hence always modifiable"); Crutchley v. Crutchley, 293 S.E.2d 793, 797 (N.C. 1982) (noting that under North Carolina law, custody order may be modified if circumstances change); *see also* Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 760 (1985) ("The law in every state, whether statutory or common, permits the courts to modify orders directing the custody of a child upon the divorce of his or her parents.").

108. 330 U.S. 610 (1947).

109. N.Y. *ex rel.* Halvey v. Halvey, 330 U.S. 610, 613 (1947).

110. *Id.* at 615.

111. *Id.* at 616.

112. 356 U.S. 604 (1958).

113. Kovacs v. Brewer, 356 U.S. 604, 608 (1958).

114. *Id.* at 605.

115. *Id.*

grandfather a better opportunity to provide for the child.[116] The North Carolina court concluded that it was not bound to give effect to the New York decree.[117] The mother sought Supreme Court review, contending that the North Carolina determination had denied full faith and credit to the New York decree.[118] The Supreme Court majority, however, noted that in New York, "a custody decree is not *res judicata* if changed circumstances call for a different arrangement to protect the child's health and welfare."[119] The Court concluded that it was at least possible that the North Carolina courts had rendered their custody determination based on a finding of changed circumstances.[120] Accordingly, the Court remanded to the North Carolina courts for clarification, indicating that if the North Carolina courts were to determine that changed conditions justified an award of custody to the grandfather "decision of the constitutional question now before U.S. would be unnecessary. Those questions we explicitly reserve without expressly or impliedly indicating any views about them."[121]

Although the Supreme Court never held the Full Faith and Credit Clause inapplicable to custody decrees, many state courts read the Court's opinions to create a custody exception to the full faith and credit mandate.[122] Other

116. *Id.* at 606.

117. *Id.*

118. *Id.* at 607.

119. *Id.* at 608.

120. *Id.*

121. *Id.* The Supreme Court avoided the constitutional question for yet a third time in *Ford v. Ford*, 371 U.S. 187 (1962). In that case, the South Carolina Supreme Court, invoking the Full Faith and Credit Clause, had held that the South Carolina courts were bound by a prior Virginia order dismissing a custody proceeding after the parents had agreed to resolution of their custody dispute. *Id.* at 190. The South Carolina Supreme Court noted that under Virginia law, a custody determination was modifiable only upon proof of changed circumstances, and the South Carolina court could find no changed circumstances since the date of the Virginia determination. *Id.* at 191. The United States Supreme Court reversed, concluding that the Virginia courts would not have given res judicata effect to the dismissal based on an agreement of the parents. *Id.* at 193-94. Hence, because the determination would not have been binding on a Virginia court, it was also not binding on the South Carolina court. *Id.* Once again, however, the Court failed to hold that the Full Faith and Credit Clause did, or did not, apply to custody decrees. *Id.* at 192.

122. *See, e.g.*, Wilsonoff v. Wilsonoff, 514 P.2d 1264, 1268 (Alaska 1973) (noting that "superior court did not err in failing to accord full faith and credit to the . . . Montana [child custody order]"); Application of Burns, 407 P.2d 885, 892 (Haw. 1965) (noting that custody decrees "cannot be treated like other judgments for purposes of extraterritorial recognition"); *In re* Miracle, 490 P.2d 638, 646 (Kan. 1971) (noting that Full Faith and Credit Clause does not fully apply to child custody decisions); Borys v. Borys, 386 A.2d 366, 373-77 (N.J. 1978) (concluding that New Jersey courts will not apply Full Faith and Credit Clause to child custody decisions); Bachman v. Mejias, 136 N.E.2d 866, 868 (N. Y. 1956) ("The full faith and credit clause does not apply to custody decrees.").

courts hold, as a matter of law, that the passage of time since the previous custody award is itself enough to permit F_2 to make a custody determination different from the F_1 determination.[123] Most courts recognize that the theoretical niceties are of minimal practical importance because it is sufficiently easy to find a change of conditions that would justify departure from an earlier custody determination.[124] Hence, for all practical purposes, if a court is not convinced about the correctness of a prior custody determination, the court was – at least until enactment of the Uniform Child Custody Jurisdiction Act (UCCJA) and the PKPA – free to disregard that determination.

The downside of this freedom, of course, was that it created significant instability in custody matters. In particular, it encouraged child snatching by a parent who might hope that the courts of a second jurisdiction would be more receptive to his pleas than was the first court to entertain a custody adjudication. Concerns about this situation led to legislation: First, the UCCJA, a uniform act ultimately adopted by the majority of states, and second, the PKPA, a federal statute binding on courts throughout the nation.[125] Both statutes were designed to discourage child snatching by requiring all courts to honor custody determinations made by a state with appropriate connections to the child.[126]

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123. *See, e.g.*, People v. Bukovich, 233 N.E.2d 382, 384-85, 386 (Ill. 1968) (noting that two years passed between sister state hearing and Illinois hearing and explaining that requirements of Full Faith and Credit Clause were met by giving Illinois court flexibility to make decision on custody based on lapse of time since sister state ruling).

124. *See, e.g.*, Borys v. Borys, 386 A.2d 366, 373 (N.J. 1978) ("[T]he term 'change in conditions' is sufficiently broad to make it possible for a court to escape what it might otherwise feel to be an obligation to recognize an earlier award through resort to the simple expedient of requiring little evidence of change." (quoting Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 57 (1940))).

125. 28 U.S.C. § 1738A (2000).

126. *See* Unif. Child Custody Jurisdiction Act §§ 13, 15, 9 U.L.A. 559, 616 (1999) (recognizing and enforcing out-of-state custody decrees); 28 U.S.C. § 1738A(a) (requiring each state to enforce custody determinations made by other states).

The UCCJA rests on the assumption that a state may, consistent with the Constitution, cut off a parent's right to custody without personal jurisdiction over the parent. Although Justice Burton's plurality opinion in *May v. Anderson*, 345 U.S. 528 (1953), indicated that the Due Process Clause might prevent a custody decree from binding a parent over whom the court lacked personal jurisdiction, the drafters of the UCCJA rested the statute on Justice Frankfurter's concurring opinion, which would have rested the decision on the principle that other states are authorized, but not required, to recognize as binding a custody determination rendered without personal jurisdiction over one of the parents. *See* Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1232 (1969) (arguing that UCCJA was drafted on basis of Chief Justice Frankfurter's opinion). For suggestions that the UCCJA might not be constitutional in some applications, see Christopher L. Blakesley, *Child Custody – Jurisdiction and Procedure*, 35 EMORY L.J. 291, 347-48 (1986) (discussing circumstances under which

The PKPA provides that every state "shall enforce according to its terms, and shall not modify . . . , any custody determination made consistently with the provisions of this section by a court of another State."[127] The statute goes on to list the conditions necessary for an initial custody determination to receive the deference mandated by the statute.[128] Finally, the statute includes an important exception: A state court may modify a custody determination made in another state if the court of the first state no longer has jurisdiction to modify the custody determination.[129] The first state no longer has jurisdiction to make the custody determination if neither the child nor any of the contestants live within the state.[130] The import of the qualification is this: If F_1 has issued a custody determination and all of the parties later move to F_2, F_2's courts remain free to modify the custody determination on their own terms, unconstrained by the federal statute. Indeed, the statute's express grant of authority to modify the determination in these circumstances must rest on the premise that the federal constitution – in particular the Full Faith and Credit Clause – does not require F_2 to honor F_1's child custody determinations, the very question the Supreme Court declined to decide in *Halvey* and *Kovacs*.[131]

The evolution of child custody law, then, demonstrates that neither the Supreme Court, nor the state courts, nor Congress have been willing to permit the courts of one state to issue a custody determination that would prevent the courts of another state from regulating the custody of a child whose entire family now resides within its borders.

UCCJA would not meet due process requirements); Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 762-64 (1982) (discussing likely invalidity of certain UCCJA applications).

Because the PKPA is a federal statute, its constitutional foundations are somewhat different. Most obviously, the statute may be treated as an exercise by Congress of its constitutional power to implement the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1. Other justifications have also been offered. *See* Note, *The Parental Kidnapping Prevention Act: Constitutionality and Effectiveness*, 33 CASE W. RES. L. REV. 89, 98-102 (1982) (suggesting Commerce Clause and §5 of Fourteenth Amendment as foundations for constitutional power). On the foundations for both statutes, see generally Blakesley, *supra*, and Coombs, *supra*.

127. 28 U.S.C. § 1738A(a) (1995).

128. *Id.* § 1738A(c).

129. *Id.* § 1738A(f). The statute gives a court jurisdiction to modify when the court meets two criteria: first, the court must itself have jurisdiction to make the child custody determination, and second, the court of the other state must have lost jurisdiction, or have declined to exercise jurisdiction, to modify the determination. *Id.*

130. *Id.* § 1738A(d).

131. If the constitution required F_2 to honor F_1's custody determinations, Congress would have no power to permit F_2 to modify F_1's determinations if those determinations were not modifiable in F_1 (unless we were to conclude that implementing power granted to Congress in Constitution included power to reduce scope of full faith and credit obligation).

2. Child Support Determinations

Child support determinations typically are modifiable – at least prospectively – as a matter of state law. Hence, the Full Faith and Credit Clause typically does not present an insurmountable problem when all or part of a family moves from one state to another.[132] So long as the state in which the first support determination was made retained power to modify the award, the Constitution does not prevent modification by a second state.[133]

Sometimes, however, a state's determination on child support is *not* modifiable as a matter of that state's law. Suppose, for instance, as in *Yarborough v. Yarborough*, F_1 requires a father to pay his child a lump sum representing support for the period of the child's minority, and suppose further that the lump sum, as a matter of state law, extinguishes all further financial obligations from father to child. Or suppose F_1's judgment purports to extinguish all support obligations when the child reaches age eighteen. What effects do such judgments have on the courts of a second state, F_2, which later wants to make an additional award to the child?

On the one hand, a non-modifiable support award looks much like an ordinary money judgment. Thus, a typical tort judgment may award a successful plaintiff a sum of money representing the court's best estimate of the tort victim's lost income and future medical costs. Medical costs may prove to be higher than the court anticipated, or the tort victim may regain less ability to work than anticipated, but those facts do not permit a second court to make an additional award. Similarly, if the tort victim recovers more quickly or completely than expected, the tort defendant may not seek a return of compensation already paid. We accept the possibility of error in the original estimate of damages in order to achieve finality that would not otherwise be available. *Yarborough v. Yarborough* suggests, at least on one reading, that the same analysis applies to support awards. There, the Supreme Court held that the Full Faith and Credit Clause prevented the South Carolina courts from awarding a daughter $50 a month in support because a prior Georgia decree had extinguished all of the father's support obligations upon payment of a $1,750 lump sum award. The Court wrote that the Full Faith and Credit Clause applied "to an unalterable decree of alimony for a minor child."[134] Hence, the court

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132. *See* N.Y. *ex rel.* Halvey v. Halvey, 330 U.S. 610, 615 (1947) (holding, in context of custody determination, that "it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered").

133. By state statute, however, the second state may be precluded from modifying a support award of the first state if the first state retains jurisdiction over the parties. *See Unif. Reciprocal Enforcement of Support Act*, §§ 11, 30, 98 U.L.A. 440-41, 529 (1987).

134. Yarborough v. Yarborough, 290 U.S. 202, 213 (1933).

signaled, a non-modifiable support award should be treated like any other non-modifiable money judgment.

On the other hand, the relationship between parent and child does not end upon entry of a non-modifiable support award. A divorce may terminate the relationship between husband and wife, but a parent remains a parent regardless. The norm of parental responsibility is so ingrained in our society that it is difficult to conceptualize any judgment as extinguishing the right of a state to require a parent to support a child who lives within the state's borders. On this view, an F_2 court should have sovereign power to regulate the financial incidents of parent and child who live within the state, regardless of any prior F_1 judgment.

This conclusion is not inconsistent with *Yarborough.* In *Yarborough* itself, after the Georgia divorce judgment extinguished the father's obligation to provide further support, the daughter, but not the father, moved to South Carolina. In holding that the South Carolina court lacked power to award further support to the daughter, Justice Brandeis, writing for the Court's majority, ended his opinion with the following sentence: "We need not consider whether South Carolina would have power to require the father, if he were domiciled there, to make further provision for the support, maintenance, or education of his daughter."[135] But if the requirement that each state give full faith and credit to the judgments of each other state required South Carolina to honor the Georgia judgment in *Yarborough,* why would the same requirement apply any less if the father had moved to South Carolina? Certainly, if Georgia had awarded judgment to a tort plaintiff, that judgment would preclude a contrary South Carolina determination regardless of the subsequent domicile of the parties. The closing sentence of the *Yarborough* opinion then suggests that child support awards should not be treated, for full faith and credit purposes, as ordinary money judgments.

Indeed, on one view, the *Yarborough* opinion rests not on South Carolina's obligation to accord full faith and credit to the Georgia judgment, but rather on South Carolina's obligation to accord full faith and credit to the Georgia statute permitting a lump sum award to extinguish all support obligations.[136] Under then-prevailing choice-of-law doctrine, the daughter's domicile, as a matter of law, was the domicile of her father, and only the law of the domicile could govern the support rights of the child.[137] To the extent the

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135. *Id.*

136. *See* Willis L. M. Reese, *Full Faith and Credit to Foreign Equity Decrees,* 42 IOWA L. REV. 183, 188-89 (1957) (interpreting Court's holding to refer both to judgment and to Georgia law).

137. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22(1) cmt. a (1971) (providing, with certain exceptions, that child takes domicile of his father); *Id.* § 29 (providing that state has

federal Constitution, through the Full Faith and Credit and Due Process Clauses, constitutionalized *First Restatement* theory,[138] the South Carolina courts were, on this view, bound to apply Georgia law to determine whether the father's support obligations were extinguished. By contrast, if both father and daughter had moved to South Carolina, South Carolina would now be free to apply its own support law. This view, then, provides an explanation for the otherwise cryptic last sentence in Justice Brandeis's opinion.

Although the Supreme Court has not revisited the issue in recent decades, a number of state court cases have held that in the situation on which *Yarborough* reserved decision – the effect of an F_1 child support award when parent and child have both moved to F_2 – the Full Faith and Credit Clause does not bind F_2 to the terms of the F_1 judgment.

The leading case remains *Elkind v. Byck*.[139] As in *Yarborough*, a Georgia divorce judgment incorporated a provision whereby father agreed to pay a lump sum for the child's support until she reached the age of eighteen in lieu of any present or future claims by the child for support or maintenance. Unlike *Yarborough*, mother, father, and child all left Georgia – mother and child for New York, father for California.[140] Eight years later, the mother

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power to exercise jurisdiction over individual domiciled in state). Moreover, in the *Yarborough* case itself, the Court articulated the same principle:

> Being a minor, Sadie's domicile was Georgia, that of her father; and her domicile continued to be in Georgia until entry of the judgment in question. She was not capable by her own act of changing her domicile. Neither the temporary residence in North Carolina at the time the divorce suit was begun, nor her removal with her mother to South Carolina before entry of the judgment, effected a change of Sadie's domicile.

Yarborough, 290 U.S. at 211 (1933) (citations omitted).

138. The *Yarborough* case was decided in 1933, only a year after the Court decided, in *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 157-59 (1932), that the New Hampshire federal court was constitutionally obligated to apply the Vermont workers' compensation law to bar recovery by a Vermont employee of a Vermont company, even though the accident that caused the employee's death had occurred in New Hampshire. Moreover, a year after the Court decided *Yarborough*, it decided *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), holding that a Mississippi court could not apply Mississippi law, which barred contractual limits on the time during which suit could be brought on an insurance policy, even though the loss that gave rise to the claim occurred in Mississippi. The court emphasized that the insurance contract had been executed in Tennessee and indicated that a state "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made." *Id.* at 149. Both *Bradford Electric Light* and *Delta & Pine* suggested that the Constitution mandates a rigid territorial approach to choice of law – the approach endorsed in the First Restatement.

139. 439 P.2d 316 (1968).

140. *Id.* at 317.

brought a proceeding in New York seeking additional monthly support for the child.[141] The New York court ordered the petition transmitted to California, where the trial court denied the requested relief, citing the Georgia lump sum award.[142] The California Supreme Court, in an opinion by Justice Traynor, reversed.[143] The court concluded that *Yarborough* "was based on the father's continued domicile and residence in Georgia"[144] and cited the final sentence of Justice Brandeis's opinion. Finally, the court noted that Georgia, had, since the *Yarborough* decision, adopted the Uniform Reciprocal Enforcement of Support Act, "which expressly reserves to the state of the obligor's residence the power to apply its law of support notwithstanding the decree."[145] Hence, even under Georgia law, the Georgia decree would be binding only in Georgia, and California was under no obligation to give the Georgia decree more effect than it would have had in Georgia itself.

As Justice Traynor recognized, the widely-adopted uniform statute "espouses the principle that no state may freeze the obligations flowing from the continuing relationship of parent and child."[146] Because the statute articulates that principle as a matter of state law, the full faith and credit question was an easy one. In several more recent cases, however, courts have held that when child and parent move from F_1 to F_2, F_2's courts are not bound by an F_1 determination that support benefits should terminate when the child reaches that state's age of majority.

Thompson v. Thompson[147] was the first of these cases.[148] A Kansas divorce decree ordered the father to pay child support.[149] Under Kansas law, an order requiring payment of child support terminates when the child reaches the age of eighteen.[150] When husband and wife both moved to Missouri, the wife sought to extend the support order to require payment of support until each child reached age twenty-one.[151] The trial court ordered support payments to continue. The court of appeals affirmed, noting that the Supreme Court had reserved judgment on the issue in *Yarborough*, and emphasizing that "Missouri need not accede to the judgment of a sister state concerning a

141. *Id.* at 318.
142. *Id.*
143. *Id.* at 321.
144. *Id.* at 320.
145. *Id.*
146. *Id.*
147. 645 S.W.2d 79 (Mo. Ct. App. 1982).
148. Thompson v. Thompson, 645 S.W.2d 79 (Mo. Ct. App. 1982).
149. *Id.* at 81.
150. *Id.*
151. *Id.* at 82.

continuing matter that has become a purely internal affair of Missouri."[152] The court emphasized that Missouri had become "the only sovereign with any legitimate continuing interest in the matter" and that extending the payment obligation until the children reached age twenty-one did "nothing to impair the sovereignty or power of Kansas" once the parties had all left Kansas.[153]

The *Thompson* approach has generated widespread acceptance – both in cases where F_2's age of majority is higher than F_1's,[154] and in cases where F_2's age of minority is lower than F_1's.[155] This acceptance suggests widespread recognition – at least among courts – that a judgment that purports to determine the future financial incidents of the child-parent relationship is not entitled to full faith and credit. In those cases where either the parent or the child remains in F_1, that state's judgment may remain binding, but the binding effect of the judgment may be more a matter of state law than of constitutional compulsion.[156]

B. Injunctions

1. Injunctions as a Remedy for Past Wrongdoing

The injunction is a common equitable remedy in cases where money damages will not make a party whole for a wrong she has suffered. Courts frequently issue injunctions designed to constrain behavior beyond the borders

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152. *Id.* at 87.

153. *Id.* at 88.

154. *See* Finney v. Eagly, 568 So. 2d 816, 819 (Ala. Civ. App. 1990) (extending Utah decree from eighteen to nineteen as allowed under Alabama law); *In re* McCabe, 819 P.2d 1116, 1117 (Colo. Ct. App. 1991) (extending California decree from eighteen to twenty-one as allowed under Colorado law); Rollins v. Rollins, 602 A.2d 1121, 1122 (D.C. 1992) (extending Maryland decree to age twenty-one, as allowed under District of Columbia law); Lewis v. Roskin, 895 S.W.2d 190, 193 (Mo. Ct. App. 1995) (extending Texas decree terminating at age eighteen to age twenty-two or completion of college education).

155. *See* Elkins v. James, 842 S.W.2d 58, 61-62 (Ark. Ct. App. 1992) (modifying Missouri decree to lower age of minority in Arkansas (eighteen)); Cavallari v. Martin, 732 A.2d 739, 740 (Vt. 1999) (requiring enforcement of Vermont age of minority (eighteen) to modify New York decree of support until age twenty-one).

156. Indeed, even as a matter of state law, legislatures and courts have been unwilling to bind a party who has moved out of the state to obligations that his new state would not impose. Section 7 of the *Uniform Reciprocal Enforcement of Support Act* provides that "[d]uties of support applicable under this Act are those imposed under the laws of any state where the obligor was present for the period during which support is sought." Unif. Reciprocal Enforcement of Support Act § 7, 8 U.L.A. 423 (1987). In *In re Marriage of Lurie*, 39 Cal. Rptr. 2d 835, 846 (Cal. Ct. App. 1995), the court construed the statute to permit California to apply its own law to excuse a father now domiciled in California from further support payments after the child reached age eighteen, even though a stipulation incorporated in a New York divorce decree mandated support payments until the children reached twenty-one.

of the state in which the court sits.[157] Thus, if an Illinois court were to enjoin disclosure of a trade secret, the injunction is intended to prohibit disclosure not only in Illinois, but in every other state as well. If the defendant were free to disclose in Michigan, the injunction would be of little value to the plaintiff. Similarly, if a court issues an injunction to enforce an employment contract's covenant not to compete, the injunction explicitly may prohibit competition in an area that covers parts of two or more states;[158] even before the dawning of the dot.com era, injunctions often had to span a multi-state metropolitan area to be effective, and the need for multistate injunctions is only likely to increase in an internet-based world.

When F_1 issues an injunction designed to constrain behavior in F_2, the injunction might conflict with the policy of F_2. In the extreme case, F_1 might enjoin a party to take an act that would be prohibited in F_2. More frequently, F_1 might issue an injunction that would not be available under the law of F_2. For instance, F_1 might enforce an employment contract by enjoining a former employee from competing with the employer in a geographical area that includes part of F_2 – even though F_2 treats such non-compete covenants as unenforceable and contrary to public policy.

Nevertheless, there is no case law at the Supreme Court – and very little in other courts – deciding whether the Full Faith and Credit Clause requires F_2 to enforce F_1's injunctions. This absence of authority is probably the product of several factors. First, F_1 courts have the opportunity to consider the effects on F_2's sovereign interests when crafting an injunction; as a matter of choice of law, F_1's courts may refrain from issuing an injunction designed to be binding in F_2 if the injunction would be contrary to a clearly expressed policy of F_2.[159] Second, once an F_1 court issues an injunction, the enjoined party may be reluctant to violate the injunction. Even if F_2's courts were not required to enforce the F_1 injunction, they might well do so as a matter of

157. *See, e.g.*, Instrumentalist Co. v. Marine Corps League, 509 F. Supp. 323, 335 (N.D. Ill. 1981) (denying motion to amend nationwide injunction under Illinois antidilution statute), *aff'd*, 694 F.2d 145 (7th Cir. 1982); *see also* David S. Welkowitz, *Preemption, Extraterritoriality and the Problem of State Antidilution Laws*, 67 TUL. L. REV. 1 (1992) (addressing problems related to extraterritorial injuctions).

158. *See, e.g.*, Reed, Roberts Assocs., Inc. v. Bailenson, 537 S.W.2d 238, 242 (Mo. Ct. App. 1976) (upholding three-state injunction against solicitation of customers).

159. *See, e.g.*, Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 46-47 (2d Cir. 1994) (limiting scope of preliminary injunction to New York state in trademark dilution case); Deere & Co. v. MTD Prods., Inc., No. 94 Civ. 2322, 1995 U.S. Dist. LEXIS 2278, at *16-19 (S.D.N.Y. Feb. 28, 1995) (limiting permanent injunction to New York state in same case); Hyatt Corp. v. Hyatt Legal Servs., 610 F. Supp. 381, 385 (N.D. Ill. 1985) (issuing anti-dilution injunction to be effective only in Illinois).

comity, and violating the injunction's terms might subject the enjoined party to contempt sanctions in F_1, F_2, or both.[160]

In cases where enforcement of a sister-state injunction does not conflict with any policy of the enforcing state, courts have on a few occasions enforced the sister-state injunction.[161] Although the courts may have invoked full faith and credit as a justification for enforcing the injunction, these are cases where there is every reason to believe that the courts would have enforced the injunction voluntarily as a matter of comity.[162] No constitutional mandate was necessary to induce these courts to enforce the sister-state injunction. As a result, these cases provide a questionable foundation for the proposition that full faith and credit requires enforcement of sister-state injunctions.

By contrast, when enforcing a sister-state injunction would impair the enforcing state's interests, what limited case law there is suggests that the Full Faith and Credit Clause does not require enforcement of the sister-state injunction. The case most squarely on point dates from the turn of the century and is more noteworthy for the prominence of the litigants than the prominence of the court. In *Philadelphia Ball Club Co. v. Lajoie*,[163] a Pennsylvania court enjoined Napolean Lajoie, a future hall-of-fame baseball player under contract with the Phillies, from playing baseball for any other club.[164] When the Phillies filed a bill in equity in the Ohio Court of Common Pleas, seeking to enforce the Pennsylvania decree, the Ohio court refused. The court con-

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160. *See, e.g.*, Glanton v. Renner, 149 S.W.2d 748, 750 (Ky. Ct. App. 1941) (reasoning that Kentucky court could use contempt sanction to enforce foreign judgment for installment payments even if full faith and credit did not require enforcement); Cousineau v. Cousineau, 63 P.2d 897, 905 (Or. 1936) (stating that contempt proceedings are available in Oregon to enforce California judgment).

161. Marie Callender Pie Shops, Inc. v. Bumbleberry Enters., Inc., 592 P.2d 1050, 1052-53 (Or. Ct. App. 1979) (holding that California judgment enjoining defendant from preparing pies using plaintiff's recipes and formulas is entitled to registration and enforcement in Oregon, but noting that "how this duty is to be enforced is a matter to be determined under Oregon law if the issue arises"); Rich v. Con-Stan Indus., Inc., 449 S.W.2d 323, 327-28 (Tex. App. 1969) (holding that California injunction against unfair competition and trademark infringement is enforceable in Texas and invoking both full faith and credit and comity principles to support its conclusion).

162. Thus, in *Rich*, 449 S.W.2d at 327, the court explicitly held that it would have enforced the injunction as a matter of comity. *Id.* In *Marie Callender*, 592 P.2d at 1052-53, the court did not suggest any reason why it would not enforce the California injunction.

163. 13 Ohio Dec. 504 (1902).

164. Phila. Ball Club, Co. v. Lajoie, 13 Ohio Dec. 504 (1902). Lajoie's contract gave the Phillies an option to renew each year for a three-year period. Phila. Ball Club, Ltd. v. Lajoie, 51 A. 973, 975 (Pa. 1902).

ceded that it was bound, under the Full Faith and Credit Clause, by the Pennsylvania determination that Lajoie had breached his contract,[165] but held that the Pennsylvania injunction did not bind the Ohio court:

> [I]t must be conceded that the judicial process of injunction . . . issued by the courts of another state, would not be permitted to control the personal conduct of a citizen of Ohio within the boundaries of Ohio. At least it must be conceded that the arm of the Pennsylvania court is altogether too short to stop this defendant from engaging in ball playing in Ohio.[166]

The court distinguished between the primary right determined by the Pennsylvania court and the "remedial" aspects of the judgment, concluding that the injunction merely was remedial, and consequently not entitled to full faith and credit.[167]

The principle that full faith and credit binds an F_2 court as to the issues determined by an F_1 court, but not as to the form of relief ordered, finds support from more respected authority than the Ohio Court of Common Pleas. As early as 1854, the New York Court of Appeals, in *Dobson v. Pearce*,[168] drew the same distinction.[169] Olney had obtained a New York judgment against Pearce, and then sought to enforce it in Connecticut.[170] Pearce responded by bringing a suit in equity in Connecticut, contending that Olney had procured the New York judgment by fraud, and seeking to enjoin Olney from further proceedings to enforce the judgment.[171] The Connecticut court found fraud and enjoined Olney from prosecuting his action on the New York judgment, on penalty of $1,000.[172] Olney then discontinued his Connecticut action and assigned his claim to Dobson, who sought to enforce the judgment in New York.[173] In holding that the courts below had properly instructed the jury that the Connecticut court's findings were binding on Dobson if Olney actually had appeared in the Connecticut action, the Court of Appeals wrote:

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165. The court wrote: "I have not discussed this contract for the reason that all issues joined therein have culminated in judgment, and it must be assumed that the parties are concluded thereby; that is, as to the legality of the contract, and all that. They joined issue, and judging from the judgment that was pronounced, all the issues were found in favor of the plaintiff." *Lajoie*, 13 Ohio Dec. at 512.

166. *Id.* at 508.

167. *Id.* at 511.

168. 12 N.Y. 156 (1854).

169. Dobson v. Pearce, 12 N.Y. 156 (1854).

170. *Id.* at 157.

171. *Id.* at 158.

172. *Id.* at 159.

173. *Id.* at 157.

> The decree of the court of chancery of the State of Connecticut as an operative decree, so far as it enjoined and restrained the parties, had and has no extra-territorial efficacy, as an injunction does not affect the courts of this state; but the judgment of the court upon the matters litigated is conclusive upon the parties everywhere and in every forum where the same matters are drawn in question.[174]

The Supreme Court's opinion in *Fall v. Eastin* also provides some support for this principle. A Washington court, in a divorce proceeding, had ordered Fall to convey to his wife a parcel of Nebraska land.[175] Fall refused and the Washington court appointed a commissioner to execute a deed to the wife.[176] Subsequently, the husband executed a mortgage on the property and conveyed the property to Eastin.[177] When the wife brought a quiet title action in Nebraska, the Nebraska courts dismissed.[178] The Supreme Court affirmed, holding that the Nebraska courts had not denied full faith and credit to the Washington decree.[179] The Court emphasized "[t]he territorial limitation of the jurisdiction of courts of a State over property in another State,"[180] but also noted that although full faith and credit requires that a judgment of one state be conclusive in other states on the merits of the claim, full faith and credit does not require sister states to execute the judgment in violation of its own laws.[181]

This position – that full faith and credit makes a judgment conclusive on the merits of the claim, but not on methods of enforcement – finds a contemporary voice in Justice Scalia's concurring opinion in *Baker v. General Motors Corp.* In *Baker*, a Michigan court, as part of a settlement agreement, enjoined Elwell, a General Motors (GM) employee, from testifying against GM in future cases.[182] Quoting snippets from a selection of the Court's opinions, Justice Scalia concluded that "[t]he Missouri court was no more obliged to enforce the Michigan injunction by preventing Elwell from presenting his testimony than it was obliged to enforce it by holding Elwell in contempt."[183] Thus, in his view the Full Faith and Credit Clause does no

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174. *Id.* at 167.
175. Fall v. Eastin, 215 U.S. 1, 3 (1909).
176. *Id.* at 4.
177. *Id.* at 2, 4.
178. *Id.* at 6-8.
179. *Id.* at 12.
180. *Id.* at 8.
181. *Id.* at 12 (citing M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 325 (1839)).
182. Baker v. Gen. Motors Corp., 522 U.S. 222, 226 (1997).
183. *Id.* at 242.

more than make F_1's judgment "conclusive evidence" of the matters adjudged in the F_1 court; the clause does not obligate F_2 to enforce the remedy awarded in F_1.

M'Elmoyle v. Cohen[184] – in which the Supreme Court held that F_2 may apply its own statute of limitations to an action brought to enforce an F_1 judgment – provides the strongest support for the proposition that full faith and credit requires F_2 to honor rights, but not remedies, determined by the F_1 court.[185] In that case, the Court held that full faith and credit does not prevent a plea which resists a judgment "upon the ground of a release, payment, or a presumption of payment from the lapse of time, whether such presumption be raised by a common-law prescription, or by a statute of limitations."[186] The Court treated the power to determine when a claim, including a claim on a judgment, should be time barred, as an essential attribute of state sovereignty.[187] By contrast, the Court saw no impairment of the first state's judgment, because a plea raising the statute of limitations was only a plea to the remedy, not to the right.[188]

Why should F_2 be entitled to apply its own statute of limitations to an F_1 judgment? As the *M'Elmoyle* court recognized, the continued validity of F_1's judgment always depends on events that occur after rendition of the judgment. Thus, if the defendant paid the judgment after it was rendered, plaintiff would not be entitled to recover again. Payment is a defense to an action on a judgment.[189] And if, in an action to enforce a judgment, there is a dispute about

184. 38 U.S. (13 Pet.) 312 (1839).

185. M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 325-28 (1839). More recently, in *Watkins v. Conway*, 385 U.S. 188, 188 (1966), the Court reaffirmed the conclusions it reached in *M'Elmoyle*, and upheld a Georgia statute imposing a five-year statute of limitations on suits on foreign judgments even though Georgia's statute of limitations for suits on domestic judgments was longer. The Court noted that there was no discrimination against foreign judgments so long as the party reviving on the foreign judgment could revive the judgment in the state where rendered. *Id.* at 188-89.

186. *M'Elmoyle*, 38 U.S. at 326.

187. Thus, the Court noted that:

> the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our States, under our system, exercise this right in virtue of their sovereignty? or is it to be conceded to them in every other particular than that of barring the remedy upon judgments of other States by the lapse of time?

Id. at 173.

188. *Id.*

189. *See, e.g.*, Osborne v. Bank of Delight, 326 S.E.2d 523, 524 (Ga. Ct. App. 1985) (citing Georgia precedents for rule that payment is complete defense to action on sister state

whether defendant paid the judgment, the F_2 court will have to resolve that dispute; the F_1 judgment did not and could not resolve disputes about whether defendant paid the judgment after rendition. But if the F_2 court must resolve the dispute about payment, should it not be entitled to use the presumptions local law provides for making such determinations of fact? Typically, a forum state is entitled to use its own procedural rules – including its own statute of limitations – in any litigation that arises in the forum's court.[190] And because the statute of limitations in effect raises a conclusive presumption of payment (or release) after a certain number of years, F_2 should be entitled, on this analysis, to apply its own statute in resolving the disputed fact issue.

Of course, neither the Supreme Court nor any other court of comparable stature has adopted the analogy to statutes of limitations and held that full faith and credit does not require a state to enforce sister-state injunctions.[191] But even in the absence of authority, some of the *reasons* for permitting F_2 to apply its own statute of limitations to an action on a judgment also suggest that full faith and credit should not require F_2 to enforce F_1's injunctions.

First, for choice-of-law purposes, questions of remedy and questions of procedure have generally been treated the same way: Forum law applies.[192] That is, even when it would be unconstitutional for a state to apply its own substantive law, the state is entitled to apply its own procedural rules (including its statute of limitations) and its own remedial framework.[193] The Supreme Court has been unwilling to impose on the states the obligation to develop special procedures and remedies for out-of-state cases.[194] And if the

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judgment); Smith v. Smith, 9 N.Y.S.2d 188, 192-93 (NY. App. Div. 1939) (stating that subsequent payment of sister state judgment constitutes legal defense).

190. *See* Sun Oil v. Wortman, 486 U.S. 717, 722 (1988) ("Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts.").

191. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 cmt. c (1971) (noting that Supreme Court "has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act").

192. *Compare id.* § 122 ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.") *with id.* § 131 ("The local law of the forum determines the manner of enforcing a judgment.").

193. The Supreme Court has made it clear, as a matter of constitutional law, that the forum is always entitled to apply its own statute of limitations. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722-23 (1988); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(1) (1971) ("An action will not be maintained if it is barred by the statute of limitations of the forum....").

194. Thus, in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988), the Supreme Court wrote:

constitution leaves the forum state free to ignore a sister state's remedies in a case where the forum constitutionally is obligated to apply the sister state's law, it is hard to see why rendition of a judgment – perhaps based on the same sister-state law – would impose on the forum the obligation to depart from its ordinary remedial structure.

Second, issuance of an injunction never finally resolves a dispute. Even if an F_2 court announces that it will enforce an injunction issued in F_1, the F_2 court will have to determine whether the enjoined party's conduct is, or is not, a violation of the injunction's terms. Even if the F_2 court finds a violation, it will have to determine the appropriate remedy – imprisonment for civil contempt, money damages, nominal fines, etc. What remedy the F_2 court deems appropriate may turn on the conduct of the parties after the initial judgment. Because no F_1 judgment could possibly resolve all of these issues in advance, a holding that full faith and credit requires F_2 to enforce F_1's injunction would impose only limited constraints on an F_2 court.

Moreover, even if full faith and credit were construed to impose on F_2 no obligation to enforce F_1 injunctions, F_2 would often, if not routinely, enforce F_1 injunctions out of comity. In addition, F_1 has power to enforce its own judgments by imposing contempt sanctions on a party who violates its injunction.[195] No comparable remedy is available with ordinary money judgments. American courts have long abandoned imprisonment for debt; imprisonment for violation of court order has not yet fallen from fashion.

To summarize, the Supreme Court has never held that the Full Faith and Credit Clause requires a state to enjoin behavior within its borders merely because another state has issued an injunction to remedy a wrong previously committed. In a variety of cases involving other forms of equitable relief, the Court has limited the obligation of a state to provide the relief contemplated by a sister-state judgment when a broad view of full faith and credit would interfere with the power of the forum state to regulate activity within its borders.

> The Full Faith and Credit Clause does not compel "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." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts.

Id. at 722. The court went on to hold that the Kansas courts could apply the Kansas statute of limitations, even though it could not apply Kansas substantive law to most of the claims at issue in the litigation. *Id.* at 729.

195. For a case imposing civil contempt sanctions, including imprisonment, on a trust settlor who refused to arrange repatriation of assets from an offshore trust, see generally *FTC v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999).

2. *Antisuit Injunctions*

Often, a party seeks an injunction not as a form of redress for violation of an adjudicated right but as a means of preventing adjudication in a particular forum. Sometimes, a party seeks an injunction to avoid a multiplicity of lawsuits.[196] In other circumstances, a party may seek to localize litigation in a favorable forum.[197] With some frequency, courts issue injunctions preventing one or more parties from bringing suit in another jurisdiction.[198] When the party who obtains the injunction seeks to enforce it in the issuing jurisdiction – for instance, by imposition of contempt sanctions – no full faith and credit issue arises. Sometimes, however, the party who obtains the injunction seeks to enforce it in another state, where the enjoined party has violated the injunction by bringing suit. In those cases the full faith and credit issue arises: Must the court of the second state enforce the first state's injunction?

The Supreme Court has never addressed the issue. State courts typically take one of two approaches: Either they refuse to enforce the antisuit injunction,[199] concluding that full faith and credit imposes no obligation to enforce, or they enforce the antisuit injunction on grounds of comity.[200] Although courts might mention full faith and credit in enforcing the antisuit injunction, they do not enforce them because of any constitutional compulsion.[201]

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196. *See, e.g.*, Forum Ins. Co. v. Bristol-Myers Squibb Co., 929 S.W.2d 114, 121 (Tex. App. 1996) (upholding injunction against suit in New York to prevent duplicative and vexatious litigation).

197. *See, e.g.*, Poole v. Miss. Publishers Corp., 44 So. 2d 467 (Miss. 1950) (upholding injunction against suit in Delaware to avoid expense, hardship, and inconvenience of litigation in distant forum).

198. The constitutional authority of a state to issue such an injunction was established in *Cole v. Cunningham*, 133 U.S. 107, 118-19 (1890) (quoting Justice Story).

199. *See, e.g.*, James v. Grand Trunk W. R.R. Co., 152 N.E.2d 858, 864 (Ill. 1958) (declining to enforce Michigan injunction); State *ex rel.* Bossung v. Dist. Ct., 168 N.W. 589, 590-91 (Minn. 1918) (holding that injunction operates *in personam*, not on court of foreign state, which is not obligated to refrain).

200. *See, e.g.*, Abney v. Abney, 374 N.E.2d 264, 268 (Ind. Ct. App. 1978) (enforcing foreign antisuit injunction under comity principles, where not violative of Indiana law); Fisher v. Pac. Mut. Life Ins. Co., 72 So. 846, 848 (Miss. 1916) (enforcing foreign anitsuit injunction on principles of comity).

201. Thus, in *Abney v. Abney*, 374 N.E.2d 264, 267 (Ind. Ct. App. 1978), the court, in enforcing a sister-state antisuit injunction on comity grounds, rejected the argument that full faith and credit required enforcement of the injunction, writing: "The reported cases unanimously agree that in the absence of a controlling United States Supreme Court decision to the contrary, there is no constitutional compulsion to recognize anti-suit injunctions." By contrast, in *Fisher v. Pacific Mutual Life Ins. Co.*, 72 So. 846 (Miss. 1916), the court enforced an antisuit injunction on comity grounds without ever mentioning full faith and credit.

The reasons for refusing to enforce antisuit injunctions are several. First, the Supreme Court long ago established that a state statute localizing jurisdiction over particular claims was not binding on the courts of other states.[202] If a state legislature cannot preclude a sister-state court from hearing a dispute, courts have reasoned, a state court should have no more power to limit the jurisdiction of a sister-state's courts.[203]

Second, the Supreme Court has indicated that only "final" judgments are entitled to full faith and credit; even final judgments are not binding if they remain modifiable in the state where rendered.[204] If a judgment escapes the mandate of the Full Faith and Credit Clause merely because the rendering court retains power to modify it, there would appear little reason to require full faith and credit to a "judgment" so preliminary that the rendering court has not yet considered the substance of the claim.[205]

Third, when a court issues an antisuit injunction, it does not enjoin a court from hearing a dispute. Instead, it enjoins a party from bringing the proceeding.[206] Even if the injunction were binding on a sister-state court, what remedy would the sister-state court be obligated to provide? Perhaps the appropriate remedy would be contempt sanctions against the party who violated the injunction rather than dismissal of the action.

Whatever the ultimate justification, the result appears certain: The Full Faith and Credit Clause does not require states to enforce antisuit injunctions. Courts may choose to enforce such injunctions out of comity, but the Constitution does not require enforcement.

IV. The Baker *Problem: Injunctions Against Testimony*

For three reasons, courts do not have frequent occasion to consider whether full faith and credit requires enforcement of those aspects of a sister-

202. *See, e.g.*, Tenn. Coal, Iron & R.R. Co. v. George, 233 U.S. 354, 360 (1914); Atchison, Topeka & Sante Fe Ry. Co. v. Sowers, 213 U.S. 55, 67-68 (1909).

203. *See* James v. Grand Trunk W. R.R. Co., 152 N.E.2d 858, 864 (Ill. 1958) (finding that Michigan court could not block jurisdiction of Illinois court through use of injunction); State *ex rel.* Bossung v. Dist. Ct., 168 N.W. 58, 591 (Minn. 1918) (finding that Nebraska court could not block jurisdiction of Minnesota court through use of injuction).

204. *See* Barber v. Barber, 323 U.S. 77, 79-81 (1944) ("We assume for present purposes that petitioner's judgment for accrued alimony is not entitled to full faith and credit, if by the law of North Carolina it is subject to modification."); Sistare v. Sistare, 218 U.S. 1, 17-18 (1910) (same).

205. *See* Abney v. Abney, 374 N.E.2d 264, 267 (Ind. Ct. App. 1978) (emphasizing that antisuit injunctions do not adjudicate merits of ultimate controversy).

206. *See id.* (noting that antisuit injunction acts upon parties rather than court); State *ex rel.* Bossung v. Dist. Ct., 168 N.W. 589, 591 (Minn. 1918) (emphasizing that injunction "operates in personam upon the one to whom it is directed and not upon the tribunal of the foreign state"). For a more extensive analysis of this argument, see generally Price, *supra* note 104.

state judgment that seeks to control out-of-state behavior. First, even today, most litigation focuses on resolving past disputes, and ends either with dismissal or with a money judgment, not with an order designed to affect future behavior. Second, even when one of the parties seeks an order constraining the future behavior of another party, courts often are uncertain of their own power to issue orders designed to limit behavior in other states. Third, even when a court does issue such an order, sister-state courts may enforce the order out of a belief that the order was correctly made, or out of a sense of comity, not because the sister-state court believes itself constrained by the full faith and credit command. As a result, neither the Supreme Court nor other courts have had frequent occasion to consider the obligations full faith and credit imposes when a court issues an order designed to control future out-of-state behavior.

In *Baker v. General Motors Corp.*, however, the issue did arise. Recall that *Baker* involved a GM engineer named Elwell, who, after long defending the safety of a GM pickup truck's fuel system, changed his position to testify, in a court action, that the GM system was inferior to competing products. When the employment relationship between Elwell and GM ended,[207] Elwell brought an action against GM, in Michigan court, for wrongful discharge. GM counterclaimed for breach of fiduciary duty, contending that Elwell had misappropriated documents and wrongfully disclosed privileged and confidential documents. GM and Elwell entered into a settlement under the terms of which GM paid Elwell a sum of money, and the parties stipulated to entry of a permanent injunction prohibiting Elwell from testifying as a witness in any litigation involving GM.

Later, the Bakers brought a wrongful death action against GM in Missouri state court, alleging that a faulty fuel pump on a GM vehicle caused an engine fire that killed their mother. GM removed to federal district court, and the Bakers sought to depose Elwell and to call him as a witness. GM objected, citing the Michigan injunction and contending that the Full Faith and Credit Clause required the Missouri federal court to honor the Michigan injunction.

The *Baker* case reached a Supreme Court eager not to undermine the basic principle that full faith and credit to judgments does not permit a balancing of state interests or policies. The Court had, in recent years, rigorously applied the full faith and credit command to require federal courts to honor state court judgments even when those judgments would preclude claims over

207. Precisely how the relationship ended was a matter of some dispute. GM and Elwell had negotiated an agreement providing for Elwell's retirement after serving as a consultant for two years. When the time for retirement came, disagreement between the parties surfaced. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 227 (1998).

which the federal courts have exclusive jurisdiction.[208] Indeed, one commentator had labeled the doctrine "the iron law of full faith and credit."[209] A number of avenues appeared available to permit the Court to hold that the Missouri court was not bound by the Michigan injunction without retreating from the Court's absolutist pronouncements on full faith and credit. This Section explores those avenues and demonstrates that most of them lead to dead ends. The exploration leads to the conclusion that the only persuasive justification for the result in *Baker* is the one developed in this article: Full faith and credit does not bind a state court to honor out-of-state judicial orders purporting to proscribe post-judgment conduct.

A. A Consent Decree Exception

In *Baker*, the injunction against testimony was the product of a settlement between the parties; the injunction was not issued after full adversary litigation. Professor Polly Price has argued that "there are compelling reasons to conceptualize consent decrees differently from other types of judgments for purposes of full faith and credit."[210] In particular, she emphasized that "consent decrees are usually entered with minimal judicial oversight."[211] When an order results from a consent decree, she noted, the originating court is less likely to consider "either the extraterritorial impact of the consent decree or its effect on unrepresented third parties."[212] Hence, she argued, that it would have been more "satisfying conceptually" for the Court to treat consent decrees as contracts rather than judgments for full faith and credit purposes.[213] Because the enforcing court is free to invoke its local policy to refuse enforcement to a contract in which the enforcing jurisdiction has an interest,[214] treating consent decrees as contracts would significantly reduce the interstate effect of the consent decree.

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208. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373-74 (1996); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 379-81 (1985).

209. William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994).

210. Price, *supra* note 104, at 771.

211. *Id.* at 772.

212. *Id.* at 772-73.

213. *Id.* at 773.

214. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (articulating standard permitting forum to apply its own law whenever state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"). For a more general discussion of the difference between full faith and credit to judgments and full faith and credit to laws, see *supra* Parts I and II.

Professor Price undoubtedly is correct that a Michigan court would have been less likely to issue the *Baker* injunction had the dispute between Baker and General Motors been fully litigated. But it should not be "surprising," as Professor Price would have it, that the Court failed to discuss the fact that the *Baker* injunction resulted from a consent decree. Rather, there are good reasons for the Court's implicit rejection of Professor Price's approach. First, as Professor Price recognized, a rule differentiating consent decrees from other final orders could have an adverse effect on settlements.[215]

Perhaps more important, however, is the converse problem: A focus on the injunction as a consent decree suggests that if the Michigan court were to issue the same injunction after an adversary litigation, then the Missouri court would have been compelled to enforce the injunction.[216] That conclusion, however, is problematic. A judicial order issued after litigation intrudes on Missouri's sovereign interest to control litigation within its borders just as much as would a consent decree. Recognition of that fact – ignored by Professor Price – undoubtedly explains why the *Baker* Court did not focus on the fact that the Michigan injunction resulted from a consent decree.

B. Deciding the Case by Reference to State Law

Justice Kennedy, concurring for himself and two other justices, would have decided the case by looking to state law. Because, in his view, Michigan preclusion rules would not have bound Baker to the injunction, Baker was not bound by the injunction in Missouri.[217]

The first problem with Justice Kennedy's emphasis on state law is that under Michigan law – as embodied in a court rule[218] – a party wishing to modify an injunction is required to present arguments to the court which issued the injunction; no other Michigan court is entitled to relieve a party from the terms of the injunction. And, indeed, several Michigan trial courts had refused to reconsider injunctions issued by other trial courts, requiring the litigants to seek relief in the court that issued the injunction. Hence, it is not surprising that both parties in the *Baker* case, and the Eighth Circuit, "seemed to embrace the assumption that Michigan would apply the full force of its judgment to the Bakers."[219] Justice Kennedy, however, read the Michigan

215. Price, *supra* note 104, at 769.

216. Of course, if issue preclusion rather than claim preclusion were at stake, the consent decree would not have been preclusive because issue preclusion applies only as to matters actually litigated. *See* Ariz. v. Cal., __ U.S. __, 120 S. Ct. 2304, 2319 (2000) (denying issue preclusive effect to consent judgment).

217. Baker v. Gen. Motors Corp., 522 U.S. 222, 247-49 (1998) (Kennedy, J., concurring).

218. MCR 2.613(B).

219. *Baker*, 522 U.S. at 247 (Kennedy, J., concurring).

court rule differently. In his view, the rule "is a procedural rule based on comity concerns, not a preclusion rule."[220] And because the rule is a procedural rule, it applies only in Michigan and is "not binding on courts of another State by virtue of full faith and credit."[221]

This construction of the rule leads to the second problem with Justice Kennedy's emphasis on state law: There is no state law principle for determining whether a Michigan court rule is a preclusion rule or a "procedural" rule. Within Michigan, characterization of the rule is irrelevant; however the rule is characterized, modification is not permitted except by the court that issued the injunction.[222] If the Michigan legislature attached to the rule a label meaningless for state law purposes – a "preclusion" label – would that label, by itself, require sister-state courts to enforce injunctions that would not be enforceable without the label? The only sensible answer to that question is no. And that leaves only one source for determining whether the Michigan rule is a preclusion rule: Federal law.

To be sure, Justice Kennedy is quite correct that state law plays an important role in full faith and credit analysis. If the Michigan injunction were not binding on the Bakers as a matter of Michigan law, it would not be binding in Missouri either. No national policy of uniformity or finality would require Missouri to accord more effect to a Michigan judgment than the Michigan courts would give it. But when a judgment is binding in Michigan, as the injunction appeared to be in the *Baker* case, only federal law can determine what effect a Missouri court must give the judgment.

C. Emphasizing the Disparity in Parties

Although Justice Kennedy's concurrence rests explicitly on his construction of Michigan preclusion law, his opinion makes it clear what he believes preclusion law ought to be: Only parties to the proceeding should be bound to the court's determination. Thus, he rejects the notion that Michigan "would make the novel assertion that its earlier injunction binds the Bakers or any other party not then before it or subject to its jurisdiction."[223] The preceding section demonstrates the difficulties with Justice Kennedy's reliance on state law. But consider the same question as a matter of federal law: Does the Full Faith and Credit Clause require an enforcing state to hold a sister-state judgment or decree binding with respect to non-parties? Conversely, suppose

220. *Id.* at 249.

221. *Id.*

222. *See supra* notes 55-61 and accompanying text (discussing res judicata).

223. Baker v. Gen. Motors Corp., 522 U.S. 222, 247 (1998).

the parties are the same in the two proceedings. Does the identity of the parties require the second state to enforce orders made by the first state's courts?

In *Baker* itself, Justice Kennedy seems to assume (although he grounds his assumption in his view of Michigan law) that because the Bakers did not participate in the Michigan proceeding, they cannot be bound by the Michigan decree. Justice Ginsburg, in her majority opinion, expressly stated the converse of that proposition: "If the Bakers had been parties to the Michigan proceedings and had actually litigated the privileged character of Elwell's testimony, the Bakers would of course be precluded from relitigating that issue in Missouri."[224] Both of these propositions, however, are overbroad.

1. Judgments Can and Do Bind Non-Parties

As a matter of state res judicata law, it generally is true that only parties to a proceeding are bound by a judgment rendered in that proceeding.[225] Even as a matter of traditional state law, however, there are significant exceptions to the rule: Persons represented by one of the parties to an action may be bound by a judgment;[226] the entire world may be bound by a judgment in rem;[227] non-parties may be bound by status adjudications.[228] Moreover, the only constraint on an individual state's power to expand on the traditional exceptions emanates from the federal Constitution's Due Process Clause. Due process undoubtedly places some limits on a state's power to preclude non-parties from challenging a judicial determination.[229] But so long as due process does not constrain a state's power to adopt a broad stare decisis doctrine, the state could easily evade whatever constraints the Constitution places on domestic preclusion doctrine.

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224. *Id.* at 239 n.12.

225. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982) ("A person who is not a party to an action is not bound by or entitled to the benefits of the rules of res judicata, except as stated in §§ 30-32 and in this Chapter.").

226. *See id.* § 41(1) ("A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party.").

227. *See id.* § 30 ("A valid and final judgment in an action based only on jurisdiction to determine interests in a thing: (1) Is conclusive as to those interests with regard to all persons, if the judgment purports to have that effect....").

228. *See* § 31(2) ("A judgment in an action whose purpose is to determine or change a person's status is conclusive with respect to that status upon all other persons, with the following qualifications....").

229. The due process issue has received extensive treatment with respect to class actions. *See generally* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998).

The real issue, then, is whether the Full Faith and Credit Clause ever requires an F_2 court to hold non-parties bound by an F_1 judgment. The answer is yes. *Johnson v. Muelberger*[230] and *Yarborough v. Yarborough* are two obvious examples.[231] In *Johnson*, a daughter whose inheritance rights were adversely affected by her father's Florida divorce brought an action in New York attacking the Florida decree. Because the daughter had not been a party in the Florida proceeding, the New York Court of Appeals had held that the daughter, as a "stranger to the divorce action," was entitled to challenge the validity of the divorce. The United States Supreme Court reversed, concluding that the daughter would not have been entitled to attack the divorce in Florida and holding that Full Faith and Credit Clause required the New York court to dismiss her action.[232]

Indeed, in the course of its opinion, the Supreme Court identified two bases on which Florida law might preclude a non-party from attacking a judgment: Attack would be foreclosed if the non-party was in privity with a party to the proceeding or if the non-party was a "stranger" to the proceeding who had too little interest to permit challenge to the judgment.[233] Nowhere does the Court suggest what limits the Constitution might place on a state's power to bind strangers to the proceeding when the state has concluded that the stranger's interest is too insignificant to warrant protection.

The *Yarborough* opinion illustrates the "privity" exception to the rule that only parties may be bound by prior judgments. Sadie Yarborough was not a party to the Georgia suit for divorce between her parents, a suit that provided for Sadie's support by ordering her father to make a lump sum payment of $1,750 to her maternal grandfather.[234] Nevertheless, when Sadie brought an action in South Carolina seeking additional support, the Supreme Court rejected the argument that because she was not a party to the Georgia proceeding, the judgment could not bind her. The Court emphasized that under

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230. 340 U.S. 581 (1951).

231. Johnson v. Muelberger, 340 U.S. 581 (1951).

232. *Id.* at 589.

233. The Court continued:

> If the laws of Florida should be that a surviving child is in privity with its parent as to that parent's estate, surely the Florida doctrine of *res judicata* would apply to the child's collateral attack as it would to the father's. If, on the other hand, Florida holds, as New York does in this case, that the child of a former marriage is a stranger to the divorce proceedings, late opinions of Florida indicate that the child would not be permitted to attack the divorce, since the child had a mere expectancy at the time of the divorce.

Id. at 588.

234. Yarborough v. Yarborough, 290 U.S. 202, 210 (1933).

Georgia law, a provision in a divorce decree providing permanent alimony for a minor child is binding on the child, even though the child was not a formal party to the suit and held that because Sadie was bound in Georgia, she was also bound in South Carolina.[235]

The point, then, is this: Judgments can and do bind non-parties, both as a matter of state law and as a matter of full faith and credit. An explanation of the *Baker* result that focuses only on the difference in parties is incomplete at best.

2. Participation in a Proceeding Does Not Inevitably Bar Review in Another State

Justice Ginsburg's opinion in *Baker* suggests that if a party appears and litigates an issue in F_1 that party is precluded from relitigating the issue in F_2. As a statement of ordinary state issue preclusion principles, Justice Ginsburg is certainly correct that litigation in one proceeding precludes relitigation in a second.[236] Even as a matter of state law, however, parties are occasionally permitted to relitigate issues previously determined.[237] And when the issue transcends state lines and becomes one of full faith and credit, an F_2 court has somewhat greater leeway – in limited circumstances – to reopen an issue previously determined in F_1.

Custody and child support determinations provide the most obvious examples. As we have seen, a number of state courts have held explicitly that the Full Faith and Credit Clause does not apply to custody decrees – even if both parents and the child were parties to the original decree.[238] Similarly, a number of state courts have held that even if F_1 has made a support award binding in that state until the child reaches that state's age of majority, F_2 may modify the award to expire when the child reaches F_2's different age of majority (at least so long as the child has moved to F_2).[239] The reason for these exceptions ought to be clear: To hold F_2 courts bound by the F_1 judgment would, in these circumstances, would constitute too great an intrusion

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235. The court first held that the judgment was binding on Sadie because "jurisdiction over the parents confers *eo ipso* jurisdiction over the minor's custody and support," *id.*, and went on to hold that Sadie's move to South Carolina did not give the courts of that state the power to impose on the father a duty that had been extinguished by the Georgia judgment. *Id.* at 212.

236. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (discussing Issue Preclusion – General Rule).

237. *See id.* § 28 (setting forth exceptions to general rule of issue preclusion).

238. *See supra* note 122 and accompanying text (discussing custody exception to full faith and credit mandate).

239. *See supra* notes 147-56 and accompanying text (discussing full faith and credit consequences when child moves to new jurisdiction).

on F_2's sovereign interests; F_2 would lose the ability to protect children who live within its borders.

Of course, the situations are rare in which an F_2 court would be entitled to revisit an F_1 determination in which the parties were identical. Most judgments – particularly money judgments – are backward-looking. They determine rights that have accrued from past conduct and make no attempt to control future behavior. Mandating enforcement in F_2 poses little threat to F_1's ability to control behavior within its borders. By contrast, custody and support determinations are forward-looking. The same might be said for a variety of injunctions. For these orders, requiring F_2 to enforce the determination would interfere more significantly with F_2's sovereign interests. Hence, it is less clear that F_2 must enforce the order – even if the parties in the two proceedings are identical.

D. Challenging the Michigan Court's Power to Issue the Injunction

The final substantive paragraph of Justice Ginsburg's majority opinion in *Baker* includes the following two sentences: "Recognition, under full faith and credit, is owed to dispositions Michigan has authority to order. But a Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks authority to resolve."[240] These sentences appear to advance three contentions: (1) Michigan had no "authority" to issue the injunction it issued; (2) if Michigan has no authority to issue an order, the order is not binding in Missouri; and (3) if Michigan has authority to issue an order, the order must be binding in Missouri. All three contentions, however, are incorrect.

First, Michigan had authority to issue its injunction. The Michigan court had personal jurisdiction over both Elwell and General Motors. And, as Justice Ginsburg herself recognized, a court of equity has authority to issue an order binding parties before the court even on issues of paramount importance to other states – such as conveyance of land in those other states.[241] Thus, nothing in the federal constitution would prevent a Michigan court from enjoining Elwell's testimony in a Missouri proceeding on pain of contempt sanctions enforceable in Michigan.[242]

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240. Baker v. Gen. Motors Corp., 522 U.S. 222, 240-41 (1998).

241. Earlier in the *Baker* opinion, Justice Ginsburg cited *Robertson v. Howard*, 229 U.S. 254, 261 (1913), for the proposition that "[i]t may not be doubted that a court of equity in one State in a proper case could compel a defendant before it to convey property situated in another State." *Baker*, 522 U.S. at 235-36. She also recognized that in *Cole v. Cunningham*, 133 U.S. 107, 134 (1890), the Court had held that antisuit injunctions were compatible with due process. *Baker*, 522 U.S. at 236.

242. Of course, if after the Michigan judgment is rendered, a Missouri court determines, with jurisdiction over Elwell and GM, that Elwell's testimony does not constitute a violation

Second, even if a Michigan court has no authority to issue an order, the order may be binding in Missouri. The word "authority" of course harbors some ambiguity. Authority might mean subject matter jurisdiction. It might mean power to apply a particular rule of law. But in either event, if the parties before the Michigan court have the opportunity to challenge the Michigan court's authority, the Michigan court's determination, even if erroneous, generally would be binding in other states.[243]

Third, authority in the Michigan court to issue the order does not, by itself, establish that the Missouri court must enforce the order. Indeed, much of the remainder of Justice Ginsburg's opinion in *Baker* appears to make that point. Justice Ginsburg went out of her way to treat equity decrees on parity with judgments at law, while then holding that enforcement mechanisms are left to the "evenhanded control of forum law."[244]

Justice Ginsburg's last paragraph should not, then, be read to hold that a Missouri court must enforce a Michigan order if and only if the Michigan court had "authority" to issue the order. Indeed, earlier in her opinion, Judge Ginsburg cited her own law review article for the opposite position – that the Constitution leaves room for injunctions enforceable in the state where rendered, but not elsewhere.[245]

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of the Michigan court's order, Michigan courts would be bound by that determination under the last-in-time rule. *See* Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939) (finding that Idaho court properly exercised its judicial powers by holding that Washington court did not have jurisdiction). *See generally* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969) (discussing scope of last-in-time rule).

243. *Durfee v. Duke*, 375 U.S. 106, 111 (1963), establishes that when a court determines, after full and fair litigation, that it has subject matter jurisdiction over a dispute, the court's determination is binding in other states.

Fauntleroy v. Lum, 210 U.S. 230, 237 (1908), is a case in which a Missouri court ignored Mississippi law in adjudicating a dispute between two Mississippi parties over a Mississippi gambling contract. Even though, under prevailing principles, Missouri might have been constitutionally obligated to apply Mississippi law, the Supreme Court held that the Mississippi courts were bound, under the Full Faith and Credit Clause, to enforce the Missouri judgment. *Id.*

244. Baker v. Gen. Motors Corp., 522 U.S. 222, 235 (1998).

245. *Id.* at 236 n.9. The Court quoted Justice Ginsburg's article, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969):

> "The current state of the law, permitting [an antisuit] injunction to issue but not compelling any deference outside the rendering state, may be the most reasonable compromise between . . . extreme alternatives," i.e. "[a] general rule of respect for antisuit injunctions running between state courts," or " a general rule denying the states authority to issue injunctions directed at proceedings in other states."

Baker, 522 U.S. at 236 n.9 (quoting Ginsburg, *supra*, at 828-29).

E. The Alternative: Recognizing that Full Faith and Credit Does Not Require A Court to Honor Sister State Orders Purporting to Control Post-Judgment Behavior

The preceding sections have explored several efforts to justify the result in *Baker* and have demonstrated why each effort fails. In fact, however, *Baker* should have been an easy case – for the reasons developed throughout this Article. The Missouri court had before it facts that arose after the Michigan court issued its injunction. The Michigan court did not consider, and could not have considered, the circumstances of the dispute between Baker and GM when it issued the injunction. Nor did the dispute between Elwell and GM present the Michigan court with a mechanism for considering the impact of its injunction on Missouri's sovereignty.

In effect, the injunction was a remedy awarded to GM on its counterclaim against Elwell for breach of fiduciary duty. But, as we have seen, F_2 courts are not generally bound to afford victorious litigants the same remedies available in F_1, especially if the remedy would interfere with a significant policy of F_2.[246] It might well be true that the Michigan injunction was an integral part of the court-approved settlement of the dispute between Elwell and GM. But even though remedies and rights are often closely related, F_2 is generally bound – for full faith and credit purposes – by F_1's determination of rights, not remedies.[247] However arbitrary the distinction sometimes appears, the distinction preserves F_2's power to control events within its borders. In *Baker* itself, the distinction between right and remedy enabled Missouri to control the course of litigation within its borders, particularly with respect to issues the Michigan court could not have considered when it issued its injunction.

Justice Ginsburg's majority opinion and Justice Scalia's brief concurrence each provide support for this view of the *Baker* case, although the analysis in each opinion is underdeveloped. Justice Scalia was content to rest on quotations from a variety of past opinions establishing that the Full Faith and Credit Clause does not require a sister state to provide the same mechanisms for enforcement of judgments that would be available in the state of rendition. That is, he recognized that F_2 is not bound to afford victorious

246. *See supra* notes 175-83 and accompanying text (asserting that full faith and credit makes a judgment conclusive on the merits of the claim but not on methods of enforcement).

247. *See* M'Elmoyle *ex rel.* Bailey v. Cohen, 38 U.S. (13 Pet.) 312, 325 (1839) ("To give it the force of a judgment in another State, it must be made a judgment there, and can only be executed in the latter as its laws may permit."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 99 (1969) ("The local law of the forum determines the methods by which a judgment of another state is enforced.").

litigants the same remedies that would be available to F_1. Justice Scalia, however, did not offer a rationale to support his conclusion.

The right/remedy distinction was also critical to Justice Ginsburg's analysis. Like Justice Scalia, she concluded that the Full Faith and Credit Clause does not require a state to "adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments."[248] And like Justice Scalia, she relied upon existing authority – particularly *M'Elmoyle v. Cohen* – to support that position.

Justice Ginsburg, however, went further in an attempt to put the right/remedy distinction in a broader context. She started by reaffirming the power of the Full Faith and Credit Clause, and then turned to exceptions. After discussing the exception for enforcement measures, she detailed particular kinds of orders that have been denied enforcement in a sister state: Those that "purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority."[249]

Why should these orders be exempt from the full faith and credit command: Because requiring enforcement would interfere unduly with sovereign interests of the enforcing state. Justice Ginsburg says as much at various points in her opinion.[250] But if the concern is with protecting the sovereign interests of the enforcing state, why stop with litigation? Certainly the enforcing state has a strong interest in controlling proceedings in local courts, but the enforcing state may have equally strong interests in assuring that children within its borders receive adequate care and support or that persons within its borders are free to practice their chosen professions. The logic that precludes one state from interfering with sister-state litigation applies with equal force to prevent that state from interfering with the sister state's control of other activities within its borders. Justice Ginsburg's attempt to cabin the exception to those cases in which the first state's order would interfere with litigation in a second state appears unlikely to be successful.

That is, the natural implication of Justice Ginsburg's opinion leads to the thesis developed in this Article: Full faith and credit does not require a sister state to enforce judgments that purport to control post-judgment behavior.

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248. Baker v. Gen. Motors Corp., 522 U.S. 222, 235 (1998).

249. *Id.* at 235.

250. *See id.* at 236 n.9 (citing Reese, *supra* note 136, at 198, to the effect that requiring dismissal of an action whose prosecution has been enjoined "would mean in effect that the courts of one state can control what goes on in the courts of another"); *id.* at 238 (noting that Michigan "lacks authority to control courts elsewhere"); *id.* at 240 (noting that "Michigan's power does not reach into a Missouri courtroom to displace the forum's own determination whether to admit or exclude evidence").

Conclusion

State res judicata doctrine has always played, and continues to play, a critical role in full faith and credit jurisprudence: If F_1's res judicata rules do not make a judgment final within F_1, then full faith and credit does not require F_2 to enforce the judgment. Too often, however, courts have suggested that the converse proposition is also true – that when an F_1 judgment is final at home, it must also be final in F_2. In fact, however, the converse proposition is not invariably true. Undermining a perfect equivalence between the two doctrines are the different purposes served by res judicata and full faith and credit. Full faith and credit is essentially a sovereignty-enhancing doctrine, co-ordinating the sovereign powers of the sister states to enhance the control each enjoys over activities about which it has greatest concern. When the res judicata doctrines of one state would interfere with a sister state's control of activities within the sister state's borders, the Constitution does not require adherence to those doctrines.