BRAINERD CURRIE

FULL FAITH AND CREDIT, CHIEFLY TO JUDGMENTS: A ROLE FOR CONGRESS

The Full Faith and Credit Clause,[1] as implemented by Congress,[2] has two principal functions: (1) it enjoins a high degree of deference to the judgments of sister states and (2) it enjoins a modest degree of deference to the laws of sister states.[3] With respect to

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Brainerd Currie is William R. Perkins Professor of Law at Duke University.

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

2 28 U.S.C. §§ 1738, 1739.

3 The implementing legislation serves the prosaic function of a rule of evidence governing the mode of proof. *Ibid.* The function as to judgments has long been recognized. Mills v. Duryee, 7 Cranch 481 (1813). A minimal function as to the law of sister states is grudgingly conceded even by those who have no sympathy with any such role for the Constitution in the choice of law. EHRENZWEIG, CONFLICT OF LAWS 28–33 (1962). Beyond this, the significance of the Clause is probably to be found in the meaning given to "judicial Proceedings." Thus, even prior to judgment, a lien arising upon the commencement of garnishment proceedings has been held entitled to recognition. Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934). And at least one state court, in full accord with what appears to be the spirit of the Clause, has abstained from the exercise of jurisdiction in deference to the mere pendency of an action in another state. Simmons v. Superior Court, 96 Cal. App. 2d 119 (1950), discussed in Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI L. REV. 620, 677–78 (1954).

judgments the clause has been meaningfully implemented by Congress; with respect to laws it has not.[4] Because of this difference of treatment, one tends to think of the law with respect to judgments as being relatively well settled. The implementing statute is, indeed, a helpful clarification of national policy; but one has only to recall the cases on recognition of divorce decrees[5] to appreciate that it falls far short of providing clear guidance for solving all problems. It is a vastly oversimplified provision, such as one might draft if the only purpose were to insure that a simple money judgment shall be enforceable by action in any state. As applied to other types of judgments it leaves unsolved problems that Congress has power to solve. Legislation on matters mainly of interest to lawyers has, of course, little political appeal, and on some of the problems, such as recognition of divorce decrees, it is difficult to suggest how Congress could improve on the solutions painfully evolved by the Court. Yet Congress has primary responsibility for defining the effect of judgments in other states. Because that responsibility has been only imperfectly discharged, the Court is often without guidance as to what national policy is, or is embarrassed by an oversimplified declaration of national policy that cannot easily be reconciled with rather clear national interests. It is not unreasonable to suggest that Congress should address itself to some of these problems, on a selective basis, and thus relieve the Court to some extent from the strains and tensions induced by the necessity of performing an essentially political function.

Three cases on full faith and credit were decided in the 1963 Term, and another in the 1962 Term. None of these is profoundly significant for the foundations of the Republic, but all decisions of the Court on full faith and credit are interesting. One of these in particular illustrates the inadequacies of the implementing statute, and recalls earlier illustrations. This paper will review the four cases

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[4] The attempt, in the 1948 revision of the Judicial Code, to apply to "acts" the statutory formula for full faith and credit to records and judicial proceedings was meaningless. See CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 200, 326 n.162 (1963) (hereafter "CURRIE").

[5] *E.g.*, Atherton v. Atherton, 181 U.S. 155 (1901); Haddock v. Haddock, 201 U.S. 562 (1906); Williams v. North Carolina, 317 U.S. 287 (1942); Williams v. North Carolina, 325 U.S. 226 (1945); Sherrer v. Sherrer, 334 U.S. 343 (1948); Cook v. Cook, 342 U.S. 126 (1951).

briefly, and then suggest a few of the instances in which Congress might help by enacting specific declarations of national policy as to interstate recognition of judgments.

I. Full Faith and Credit to Public Acts: The Clay Case

Clay v. Sun Insurance Office, Ltd.,[6] brings to a happy ending a distressingly protracted bit of litigation. It does so, however, in such a way as to make the problem involved seem deceptively simple. If the opinion of Mr. Justice Douglas for the unanimous Court is taken at face value one must wonder why any litigation at all was necessary, or at least why it was not terminated at an earlier stage. I believe that the problem is not quite so simple, and that the opinion leaves some troublesome questions for the future.

In 1952 Clay, then a resident of Illinois, purchased in that state a "Personal Property Floater Policy (World Wide)." The insurer was a British company licensed to do business in Illinois, Florida, and other states. Some months later Clay moved to Florida where, in 1954–55, certain items of personal property belonging to him were deliberately damaged or destroyed by his wife. Notice of the loss was promptly given to the insurer, which promptly denied liability. More than two years later—on May 20, 1957—Clay instituted suit in the United States District Court for the Southern District of Florida. The insurer invoked a clause of the policy requiring that suit on any claim for loss be brought within twelve months after discovery of the loss. Treating the clause as invalidated by a Florida statute prohibiting contractual provisions shortening the time to sue afforded by Florida limitation statutes, the district court gave judgment for Clay in the amount of $6,800. The court of appeals reversed, one judge dissenting, on the ground that to apply the Florida statute to invalidate the suit clause, which was valid under the law of Illinois, would be a denial of due process.[7] The Supreme Court vacated the judgment, holding that "a serious constitutional issue" should not thus have been disposed of without a prior determination of whether the Florida courts would have held the statute applicable to this Illinois contract, and remanded with the suggestion that that question be referred to the Florida

[6] 377 U.S. 179 (1964).

[7] Sun Insurance Office, Ltd. v. Clay, 265 F. 2d 522 (5th Cir. 1959).

Supreme Court.[8] Mr. Justice Black dissented, protesting against what he regarded as an extreme and unjustifiable application of the principle that uunecessary constitutional adjudications should be avoided, and arguing further that the Florida statute was clearly constitutional as applied. The Chief Justice joined in this opinion, as did Mr. Justice Douglas, who added one of his own to "give renewed protest" to the avoidance of the constitutional question.

On remand the court of appeals certified the question to the Supreme Court of Florida, which answered that the Florida statute was indeed applicable to invalidate the suit clause in these circumstances.[9] Again the court of appeals reversed the district court's judgment, a different panel of judges holding that the statute, as construed by the Florida Supreme Court and as applied by the district court, was a denial of due process.[10] Predictably, the Supreme Court granted certiorari.[11]

The definitive decision affirming Clay's right to recover $6,800 came almost exactly seven years after the action was filed, and almost four years after the Supreme Court's remanding decision. There has been ample time, therefore, to think about the problem presented; and in the course of that time I have worked out an analysis that enables me to welcome the result. That analysis, which, compared with the reasoning of Mr. Justice Douglas, may seem rather elaborate, may be briefly summarized:

1. Neither the Full Faith and Credit Clause nor the Due Process Clause[12] prevents a state from applying its own law in preference to that of another state when the forum state has a legitimate interest in applying the policy embodied in its law.[13]

2. The foregoing principle is subject to this limitation: Ordinarily, the interest of the forum state must have existed at the time of the transaction or events on which the rights of the parties de-

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[8] Clay v. Sun Insurance Office Limited, 363 U.S. 207, 209, 212 (1960). Also to be determined was another question of state law not material here: whether the policy covered the risk of deliberate destruction by the spouse of the insured.

[9] Sun Insurance Office Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961).

[10] Sun Insurance Office Ltd. v. Clay, 319 F. 2d 505 (5th Cir. 1963).

[11] 375 U.S. 929 (1963).

[12] U.S. CONST. amend. XIV, § 1.

[13] CURRIE ch. 5.

pend. To apply domestic law when the forum state had no interest in the application of its policy at that time raises problems similar to those raised by the retrospective application of laws.[14] That is to say, the law in question ought not to be applied unless the unsettling of private expectations can be justified by the urgency of the public purpose to be accomplished.[15]

3. To the extent that a state is justified in applying its laws retroactively to domestic transactions, it is equally justified in applying them to foreign transactions in which its interest arose after the rights of the parties were settled. When, however, a statute is limited to prospective operation, there is an inference that the legislature has found no adequate ground for unsettling private expectations, and it seems to follow that the statute should not be applied to foreign transactions in which the state had no interest at the time they occurred.[16]

4. But time can never cure the problem of the out-of-state transaction that now affects domestic interests, as it can cure the problem of the prior domestic transaction. Therefore, although the legislature may not have found it necessary to abrogate prior domestic transactions, it may be reasonable to construe the statute as abrogating out-of-state transactions—if, of course, the exigency of the public need can be said to outweigh the unfairness of unsettling the private expectations affected.[17]

As Mr. Justice Black has said, the Florida statute invalidating suit clauses expressed a policy "to preserve a fair opportunity for people who have bought and paid for insurance to go to court and collect it."[18] But the legislature did not consider that policy so urgent as to require invalidation of existing contracts; the statute was expressly limited to prospective operation. Hence it seemed to me, for a time, that there was no such urgency as to justify invalidation of out-of-state contracts. What I overlooked was that, while pre-1913 contracts have probably long since ceased to be a problem, Illinois residents can continue to move to Florida, bringing with them their Illinois insurance policies and their risks of

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[14] *Id.* at 229–32, 235–36.

[15] *Id.* at 738.

[16] *Id.* at 426 n.166, 457–59, 620–26.

[17] *Id.* at 737–39.

[18] 363 U.S. at 215.

loss, until the end of time. Surely there is no legal principle that renders Florida helpless to deal with that problem.

The opinion of the Court upholding the Florida statute as applied is innocent of such doubts and difficulties. "We see no difficulty whatever with either the Full Faith and Credit Clause or the Due Process Clause."[19] The opinion is brief, even elliptical: nowhere is the controlling constitutional principle stated except by inference: ". . . Florida has ample contacts with the present transaction and the parties to satisfy any conceivable requirement of full faith and credit or of due process."[20] What is the requirement? I may concede in advance to my friend Professor Ehrenzweig that there is some intimation here that there may be none at all; but I am not prepared to believe that the Court would so hold, nor to accept that conclusion as sound or desirable. If we read the opinion in the context of what was said by the lower courts, its meaning becomes somewhat clearer. The court of appeals conceived that Florida could constitutionally apply its statute only if the state "had such significant contacts with the factual phases of the litigation as to give it a paramount interest in the control of the governing legal rules . . . ,"[21] rejecting the Florida court's conception that the statute was properly applicable to " 'any contract whatever'—foreign or domestic—when Florida's contact therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon."[22] The Supreme Court appears to be saying: "If the constitutional requirement is that Florida have such contacts as are described by the court of appeals, such contacts are present in this case." The Court had no occasion to disavow the Florida Supreme Court's conception, and I trust that its omission to do so will not be construed as approval of it; yet it is disturbing that Mr. Justice Douglas' first remark addressed to the constitutional problem was:[23] "We deal with an ambulatory contract on which

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[19] 377 U.S. at 181.

[20] *Id.* at 183.

[21] 319 F. 2d at 510.

[22] 133 So. 2d at 738, quoted 319 F. 2d at 509.

[23] 377 U.S. at 181. See also *id.* at 182 where, in the quotation from Mr. Justice Black's earlier dissenting opinion, the insurer's amenability to suit in Florida is again emphasized.

suit might be brought in any one of the several States." There is not much else in the opinion to shed light on the constitutional requirement, except that the discussion of older cases suggests that there may be a requirement of more than slight or casual "activities" within the state, and a quotation from Mr. Justice Black's earlier dissenting opinion enumerates some of the Florida contacts and argues inferentially that the insurer could hardly have been unfairly surprised by the application of Florida law.

I am disturbed, of course, by this statement—or non-statement—of constitutional principles affecting choice of law in terms of "contacts," or "significant contacts." It cannot be too often repeated that the significance of the ways in which a state is related to the parties, the events, the property, or the litigation cannot be determined without reference to some standard[24]—a standard that the *Restatement (Second)* conspicuously neglects to supply.[25] But for present purposes, at least, this is not my chief concern. Surely we cannot go on indefinitely speaking of "significant contacts" without asking and answering the question: Significant for what? And there is enough in the earlier decisions of the Court to make it clear that the significance of the ways in which a state is related to a case must be judged in terms of the state's policy and the legitimate scope of its interest in applying that policy. Thus we need not dwell here on the extent to which the facts of the *Clay* case could be altered without reducing the "contacts" below the constitutional minimum.[26] My present concern is that the

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[24] See Currie, *Comment on* Babcock v. Jackson, 63 COLUM. L. REV. 1233 (1963).

[25] See RESTATEMENT (SECOND), CONFLICT OF LAWS, § 332 (tent. draft No. 6, 1960) ("most significant relationship").

[26] Following the decision of the Florida Supreme Court in the *Clay* case, a district court of appeal has applied the statute in favor of a *non-resident* plaintiff whose insured vessel was damaged in Florida waters. Schluter v. National Union Fire Ins. Co., 144 So. 2d 95 (Fla. 1962). It would be difficult to deny Florida an interest in applying its policy in such a case; indeed, it may be that such treatment of non-residents is required by the Equal Protection Clause. See CURRIE ch. 11. On the other hand, an earlier decision by a United States district court in Florida, Holderness v. Hamilton Fire Ins. Co. of New York, 54 F. Supp. 145 (S.D. Fla. 1944), refusing to apply the statute for the benefit of a *non-resident* plaintiff suing to recover insurance on a *building* in North Carolina, has recently been cited with approval by another district court of appeal in a case not involving the statute. Confederation Life Ass'n v. Ugalde, 151 So. 2d 315, 318 (Fla. 1963). Though the Supreme Court's first decision in the *Clay* case was cited, the 1961 decision of the

Court gave no explicit attention to the problem of time—to the seemingly reasonable limitation that ordinarily the interest of the forum that justifies the application of domestic law must have existed at the time of the transaction. At least on the surface, the Court thus seems to have given tacit approval to that portion of the Florida Supreme Court's holding asserting the applicability of the statute whenever the requisite "contact" can be found, whether it existed at the time of the execution of the contract or occurred thereafter.[27] If so, the decision may lead to some unjust results, or at least to cases in which injustice can be avoided only by ingenious resort to vague criteria. The only safeguard lies in the attention given by the Court, in its discussion of Florida's "contacts" with the case, to certain circumstances (not all appropriately described as "contacts") supporting the view that the insurer was not unfairly surprised by the application of Florida law—notably the fact that the policy afforded world-wide protection.

It has seemed to me that when a contract is made in such circumstances that only one state then has an interest in the matter, the rights of the parties become settled (a term that for some reason I prefer to "vested"), and ought not to be unsettled by application of a different law unless the usual justifications for unsettling settled rights exist. A case in point is *John Hancock Mutual Life Ins. Co. v. Yates*,[28] where every conceivable "contact" with a life insurance policy related to New York until the widow-beneficiary moved to Georgia and filed suit. The Supreme Court held that Georgia's application of its own law relating to misrepresentations in the application was a denial of full faith and credit to the laws of New York. Professor Alfred Hill, rejecting my suggestion that Georgia had no timely interest in the matter, nevertheless supported the result on the ground that Georgia "may not apply its own law because to do so would unfairly defeat the reasonable expectations of

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Florida Supreme Court in response to the certified question was not. In both of the cases last cited reliance was placed on the discredited idea that, while domestic policy may be used as a ground for withholding affirmative relief on a foreign cause of action, it cannot be used to strike down a defense valid under foreign law. See CURRIE, 211 *et seq.*

[27] 133 So. 2d at 738.

[28] 299 U.S. 178 (1936), discussed in CURRIE at 235–36.

the parties."[29] If the Florida Supreme Court has correctly stated the constitutional requirement, Georgia had the necessary "contact," since the insurer was licensed to do business there and the Georgia court had jurisdiction. A life insurance policy is "ambulatory," if that means that an action on it is transitory. The widow was free to move to Georgia, and become a resident, as she did. Is this enough, under the *Clay* decision, to give Georgia "contacts" sufficient to justify the application of its law?

It may be suggested that in *Clay*, though not in *Yates*, the loss insured against occurred in the forum state. The suggestion implies that had Mr. Yates, the insured, become a resident of Georgia and died there, the result would have been different. The implication finds support in the *Clay* case:[30] " 'Insurance companies . . . do not confine their contractual activities and obligations within state boundaries. They sell to customers who are promised protection in States far away from the place where the contract is made. In this very case the policy was sold to Clay [substitute Yates] with knowledge that he could take his property [substitute residence] anywhere in the world he saw fit without losing the protection of his insurance.' " But if the rights of the parties become vested—I mean settled—under the law of the only state interested at the time of contracting, I find it difficult to understand why the unilateral act of one of the parties in moving his residence should unsettle those rights, and still more difficult to understand why, if his act does have that result, the similar act of the beneficiary should not.

In short, if the *Clay* case stands for no more than the proposition that a state may apply its law if and only if it has adequate "contacts," or "significant contacts" with the matter, it will be very difficult indeed to determine the adequacy of the contacts. I have already said that I believe the decision means more; that, read in the light of earlier decisions, it means that the forum state must have a legitimate interest in applying the policy of its law to the case in hand. Moreover, it seems clear that the decision calls for more than a mere tallying of the ways in which the parties, the activities, the physical objects involved, and the litigation touch the state. There

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[29] Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 495 (1960), quoted in CURRIE at 620.

[30] 377 U.S. at 182.

is a definite concern with the foreseeability of the possible application of a law different from that which originally determined the rights of the parties—in other words, with fairness. Thus the Court seems to have in mind essentially the same thing that Professor Hill has when he speaks of unfairly defeating "the reasonable expectations of the parties," and that I have in mind when I suggest the relevance of the criteria of fairness employed in assessing retrospective legislation. There seems to be fundamental agreement in all three approaches. I believe that, generally stated though they necessarily are, those criteria furnish a more precise and reliable tool for attacking the problem than either the Court's technique of treating the question of fairness as an undifferentiated aspect of the calculus of "contacts" or Mr. Hill's appeal to a concept that inevitably begs the question.

Problems of this sort commonly involve provisions of the forum's law such as could clearly be applied retroactively to domestic contracts. Perhaps the usefulness of the suggested analysis can be better tested if we assume, instead, a more difficult case. Suppose that in 1960 a resident of Illinois obtained a life insurance policy in that state from a company licensed to do business there and in North Carolina, naming his wife, also a resident of Illinois, as beneficiary. The policy contains a clause, valid by the law of Illinois, excluding suicide from its coverage. In 1961 the insured and his wife moved to North Carolina. Fifty years earlier (we assume) North Carolina had enacted the following statute:[31]

> In all suits upon policies of insurance upon life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void.

In 1964 the insured commits suicide, and his widow sues the insurer in North Carolina. Is North Carolina constitutionally free to apply its statute?

Clearly the oversimplified test formulated by the Florida court is

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[31] *Cf.* the Missouri statute, Mo. STAT. ANN. § 376.620 (1949), considered in Lukens v. International Life Ins. Co., 269 Mo. 574 (1917), *writ of error dismissed "per stipulation,"* 248 U.S. 596 (1919); discussed in CURRIE at 509–11.

satisfied. Moreover, the objective "contacts" are similar to and seem every bit as ample as those in the *Clay* case. How is the question of fairness, or the reasonable expectations of the parties, to be resolved?

Suppose, now, that there are authoritative precedents to the effect that such a statute could not, consistently with due process, be applied to domestic insurance policies issued prior to its enactment. Are not these precedents relevant, if not decisive? Would it not be deplorable if they were overlooked in a decision holding merely that North Carolina's "contacts" with the matter were ample?

Suppose, instead, that the authoritative precedents are to the effect that such a statute may be retroactively applied; and the North Carolina Supreme Court has held that, while the legislature did not see fit to make the statute retroactive, knowing that the problem so far as domestic contracts were concerned would work itself out in time, it must be applied to out-of-state contracts if North Carolina's policy for the protection of its residents is not to be frustrated forever by suicide clauses. Are not these precedents also relevant, if not decisive?

Precedents such as these will not always be available; but the criteria for determining the validity of retroactive legislation seem a better guide than any other that has been suggested for judging the fairness of applying the law of the forum to foreign contracts in circumstances like those of the *Clay* case.[32]

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[32] At least one court has recognized that application of domestic law to a foreign transaction in which the forum state lacked a contemporaneous interest raises problems similar to those associated with retroactive application of legislation to domestic affairs: "Another analogy is found in the holding that the statute of frauds did not apply to contracts to make wills entered into before the statute was enacted. . . . Just as parties to local transactions cannot be expected to take cognizance of the law of other jurisdictions, they cannot be expected to anticipate a change in the local statute of frauds. Protection of rights growing out of valid contracts precludes interpreting the general lauguage of the statute of frauds to destroy such rights whether the possible applicability of the statute arises from the movement of one or more of the parties across state lines or subsequent enactment of the statute." Bernkrant v. Fowler, 55 Cal. 2d 588, 595 (1961) (Traynor, J.). *But cf.* M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 867–71.

Two minor comments on the *Clay* case should be added: (1) Happily, there is no reference in the opinion to that seductive but unhelpful dichotomy, substance

II. Full Faith and Credit to Judgments

A. POSTHUMOUS ALIMONY—THE ALDRICH CASE

In 1945 the Circuit Court of Dade County, Florida, granted Mrs. Aldrich a divorce from her husband, as it had unquestioned jurisdiction to do. At the same time, having statutory authority to grant alimony and having jurisdiction of the person of the husband, it decreed that the husband pay her $250 a month (later reduced to $215 a month) as permanent alimony. The decree provided further that the alimony payments "shall, upon the death of said defendant [the husband], become a charge upon his estate during her [the wife's] lifetime. . . ." A rehearing was denied and no appeal was taken. Thereafter, although he remarried and became a resident of West Virginia, the husband made all the required payments until his death in 1958. No payments were made thereafter, and eventually Mrs. Aldrich filed suit against the executor in West Virginia to recover accrued installments. The trial court dismissed her complaint and the Supreme Court of Appeals affirmed, holding that the Florida court had no jurisdiction to award alimony in installments payable by the husband's estate after his death.[33] The Supreme Court granted certiorari and, being uncertain of the Florida law, took advantage of the certificate procedure employed in the *Clay* case to propound four questions to the Florida court.[34] The Florida court responded that, while it was error for the circuit court to award posthumous alimony in the absence of a prior agreement between the parties, there was no lack of jurisdiction to do so; the unappealed judgment "passed into verity, became final, and is not subject to collateral attack."[35] Accordingly, the Supreme Court reversed the West Virginia judgment, holding that the Full Faith and Credit Clause required that the judgment be given the same effect as it had in Florida.[36]

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versus procedure. (2) Tacitly the opinion assumes that the requirement of full faith and credit to the laws of sister states (whatever it may be) applies to decisional law. No statute, but only Illinois cases, sustained the validity of the suit clause. 377 U.S. at 181.

[33] Aldrich v. Aldrich, 127 S.E. 2d 385 (W. Va. 1962).

[34] 375 U.S. 75 (1963).

[35] Aldrich v. Aldrich, 163 So. 2d 276 (Fla. 1964).

[36] 378 U.S. 540 (1964).

The decision is so clearly right that there is little scope for comment. It is right, in the first place, because it is required by the clear language and purpose of the implementing statute,[37] and in the second place because, as will be shown, it is required by precedent. This is not to say that the correct result was perfectly clear to the West Virginia court. It is a common failing of courts and lawyers—perhaps even of law professors—to speak in terms of want of jurisdiction when nothing more is involved than simple errors of substantive law; and the West Virginia court, which indicated full sympathy with the policy of full faith and credit where valid judgments are concerned, was able to cite one case saying (though not holding) that just such a decree as this one was "without authority of law and void."[38] But on this question there was nothing more to be said after the Florida Supreme Court held the judgment valid and secure against collateral attack; the judgment was entitled to the same effect in West Virginia that it had in Florida.

The Supreme Court cited only one of its prior decisions in support of the decision.[39] It might have cited more. For example, *Milliken v. Meyer*[40] is clear authority for the proposition that where the rendering court has jurisdiction of the cause and the parties "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based."[41] And *Treinies v. Sunshine Mining Co.*[42] and *Morris v. Jones*[43] make it clear that this is so even when the supposed error committed by the rendering court is of constitutional

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[37] 28 U.S.C. § 1738.

[38] Edmondson v. Edmondson, 242 S.W. 2d 730, 736 (Mo. App. 1951). Just why the West Virginia court should have been so astute to find a lack of jurisdiction in the Florida court is not clear. A vigorous dissenting opinion cites Hale v. Hale, 108 W. Va. 337, 150 S.E. 748 (1939), holding that a decree for posthumous alimony would not even be erroneous, much less void, under the law of West Virginia itself. It does appear that the accrued installments exceeded the appraised value of the estate; the wife was seeking to reach in addition property which the husband had conveyed to others, allegedly without consideration. 127 S.E. 2d at 387.

[39] Johnson v. Muelberger, 340 U.S. 581 (1951).

[40] 311 U.S. 457 (1940).

[41] *Id.* at 462.

[42] 308 U.S. 66 (1939).

[43] 329 U.S. 545 (1947).

dimensions—as when it denies full faith and credit to the judgment of another state.

These minor aspects of the case deserve mention:

1. The certificate procedure for ascertaining the law of Florida worked more expeditiously here than in the *Clay* case (which was, after all, the pioneer in its implementation). The decision of the Supreme Court of Appeals of West Virginia was announced October 22, 1962; the Supreme Court certified the questions on November 12, 1963; the Florida Supreme Court answered them on April 22, 1964; and the Supreme Court finally disposed of the case on June 22, 1964. In its answering opinion the Florida court said:[44] "We appreciate the courtesy of the Supreme Court of the United States in allowing this court to participate in the settling of an important principle of *state* jurisprudence."

2. Although the Florida decree provided that the alimony obligation should be a "charge" on the estate, there was apparently no intention of creating anything in the nature of a lien, but only of establishing the obligation. No question of the power of Florida to create such a lien on property being administered in West Virginia was presented or decided, though the dissenting West Virginia judge said:[45] "I agree that the portion of the Florida decree which states that the alimony awarded shall 'become a charge upon his estate during her lifetime' cannot have the effect of creating a 'charge' in the sense of a lien, equitable or otherwise, upon the husband's real estate in this state."

3. In a "parenthetical" paragraph, going well outside the scope of the certified questions as well as of any requirement of the pending action, the Florida Supreme Court said that a decree awarding alimony payable in installments is modifiable, after the death of the husband, to provide for payment of a gross sum by the estate.[46] Having sustained such decrees as binding on the estate in two situations—where the parties have agreed that the estate shall be bound, and where the court has erroneously but finally charged the estate—the court was presumably concerned lest such decrees unduly delay

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[44] 163 So. 2d at 277. (Emphasis in the original.)

[45] 127 S.E. 2d at 394. The question could conceivably become important in connection with the wife's attempt to reach the property transferred by the husband.

[46] 163 So. 2d at 284, citing Van Haltern v. Van Haltern, 351 Mich. 286 (1958).

the closing of estates. In the pending action the divorced wife sought only accrued installments. At a later time, however, she might seek to establish the decree as the foundation of her right to continue to receive the monthly payments during her life; and in that event different questions of full faith and credit, relating to the enforcement and modification of modifiable decrees, would be presented.[47]

4. The judge who dissented from the West Virginia decision suggested another reason why the Florida judgment should be enforced: even if the rendering court lacked jurisdiction, the husband was estopped to raise the objection because of his participation in the trial.[48] The following discussion of *Durfee v. Duke*[49] may shed some light on this suggestion.

B. ADJUDICATION OF JURISDICTION AS RES JUDICATA—LAND DECREES—DURFEE V. DUKE

The boundary between Nebraska and Missouri is the middle of the main channel of the Missouri River. A hundred years ago there stood an island on the Nebraska side of the river. That island is no more. Somehow, with the passage of time, the river changed its course to the other side of the island, and the erstwhile channel between the island and Missouri became dry land, so that the land that was the island now appears to the unaided eye to be an integral part of the "mainland" of Missouri.

After this geographic surgery had been accomplished, Durfee acquired a paper title to the land by virtue of a sheriff's deed pursuant to a tax foreclosure sale—by authority of the State of Nebraska; and Duke acquired a paper title to the same land by virtue of a swamplands patent—by authority of the State of Missouri. Durfee sued Duke in a state court of Nebraska to quiet title in himself. Duke challenged the jurisdiction of the court, asserting that the land was in Missouri.

The question of jurisdiction and the question on the merits were the same; for each title depended on the sovereignty over the land of the state from which it was derived, so that if the court lacked

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[47] See Biewend v. Biewend, 17 Cal. 2d 108 (1941); Worthley v. Worthley, 44 Cal. 2d 465 (1955), discussed in CURRIE at 659–62.

[48] 127 S.E. 2d at 396.

[49] 375 U.S. 106 (1963).

jurisdiction because the land was in Missouri the land belonged to Duke, while if the court had jurisdiction because the land was in Nebraska the land belonged to Durfee.

The law of such physical phenomena is that if the river's course changes by accretion—that is, by gradual action of natural forces—the boundary changes with it, whereas if the change occurs by avulsion—suddenly and rapidly—the boundary remains where it was.[50] It was not clear just what had happened to the Missouri; reasonable men could and did disagree. No doubt the gradual processes of nature had something to do with it; but a bridge had been built a short distance upstream, and the United States Government had undertaken channel-control measures. The Nebraska courts concluded that the change of course was caused by these "works of man," and that such a cause was analogous to avulsion, though that is ordinarily associated with natural forces. It declared Durfee the owner.[51]

Although the issue had been fully litigated, Duke, without attempting to obtain review by the Supreme Court, filed suit against Durfee in a Missouri state court for no other purpose than to relitigate the same issue. Upon removal to the United States district court, the case was retried on the basis of the Nebraska record and other evidence; and the district judge, taking a different view of the facts (though not of the basic rule distinguishing accretion and avulsion), found that the river's course had changed by accretion, so that the land was in Missouri. Nevertheless, believing that the Nebraska judgment rendered the matter res judicata, he dismissed Duke's action "with much reluctance." The court of appeals reversed and remanded. Agreeing with the finding that the land was in Missouri, it concluded after a searching review of the authorities that, while an adjudication affirming jurisdiction of the subject matter is sometimes conclusive, "for a land case such as this, a policy of carefnl recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdiction outweighs any conflicting res judicata principle."[52]

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[50] Nebraska v. Iowa, 143 U.S. 359 (1892).

[51] Durfee v. Keiffer, 168 Neb. 272 (1959). (Keiffer was a tenant of Duke's, joined as a co-defendant.)

[52] Duke v. Durfee, 308 F. 2d 209, 220 (8th Cir. 1962).

The Supreme Court reversed.[53] While it is ancient doctrine that a court, asked to respect the judgment of a sister state, is free to inquire into the jurisdiction of the rendering court, it is modern doctrine that further inquiry is foreclosed when it appears that the jurisdictional question has been fully litigated; and this doctrine applies even though the jurisdictional question relates to that highly sensitive subject, power to affect title to land.

The decision is wholesome, constructive, and welcome. It is faithful to the principles of res judicata and full faith and credit, terminating the litigation of an issue once it has been fully and fairly tried. It is fair to the parties, and threatens no impairment of the legitimate interests of any state. It is a logical extension of a principle that, applied to questions of jurisdiction of the person a generation ago,[54] seemed a "bootstrap" doctrine to the elder brethren but now seems as natural and almost as necessary as breathing. The principle had previously been extended to questions of jurisdiction of the subject matter, or the competency of the court;[55] the only novelty in the present decision is that the present application involves a question about the political locale of real estate. But the Supreme Court's attitude toward this innovation provides a refreshing contrast to the court of appeals' insistence that the exclusive control by a state of questions of title to land "within its borders" is so sacrosanct as to overpower all the other considerations involved in the policies of res judicata and full faith and credit.

If there are critics of the decision, I trust they will explain how the impasse that would have been created by the opposite result could be resolved. There would then be two inconsistent, final judgments. It is not hard to visualize the embarrassment that would ensue if the victors should invoke the aid of their respective law enforcement officers. Perhaps for the time being the Missouri judgment, as the later in time, ought to be considered the controlling one; that would be the probable result if there were a procedure available for securing an impartial judicial resolution of the conflict,[56] yet there is surely no sound basis for believing, as a general

[53] Durfee v. Duke, 375 U.S. 106 (1963).

[54] Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

[55] *E.g.*, Stoll v. Gottlieb, 305 U.S. 165 (1938).

[56] *Cf.* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

proposition, that the second judgment rather than the first represents truth. If the Nebraska courts are willing to entertain a new action by Durfee despite the fact that they have already adjudicated the matter surely they must be as free to examine the jurisdiction of the Missouri court as the Missouri court was to examine the jurisdiction of the Nebraska court; and the second Nebraska judgment, then being the last in time, should prevail—for the time being. Interpleader in the federal courts seems not an appropriate remedy; if it were, the result would be merely to give controlling effect to the last judgment in time.[57] Presumably the grant of jurisdiction to the federal courts over controversies between citizens of the same state claiming land under grants from different states[58] would not be applicable even as an original matter; and even if it were applicable in these circumstances, how would the jurisdiction be exercised in the light of the prior inconsistent judgments? The ouly way to deal with such a debacle is to prevent it. Once a judgment determining title to land after full litigation of the issue, with jurisdiction of both parties, has become final, every other state must be required to respect it.

Of the broader implications of the decision one cannot, of course, speak with confidence. The decision, however, is not that every litigated determination of competency is conclusive. The Court expressly states that there are exceptions, and cites with apparent approval a case in which federal pre-emption[59] and another in which sovereign immunity[60] prevailed over principles of res judicata; yet in so doing the Court noted that the jurisdictional issues had not been actually litigated in the first forum.[61] The court of appeals had given prominence in its analysis to the principle as formulated in two *Restatements*, to the effect that in this situation "the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdic-

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[57] *Ibid.*

[58] U.S. CONST. art. III, § 2.

[59] Kalb v. Feuerstein, 308 U.S. 433 (1940).

[60] United States v. United States Fidelity Co., 309 U.S. 506 (1940).

[61] 375 U.S. at 114 n.12.

tion."[62] The Supreme Court did not give so much deference to the American Law Institute, but quoted the formulation.[63] Perhaps the clearest lesson to be learned from the decision is that in the weighing process the vital policy underlying the doctrine of res judicata is not to be underestimated. "That the doctrinal basis of res judicata is living law and not archaic formula is shown in its authoritative extension in recent years."[64] As a minimum, the lesson is that that policy is not to be judged outweighed because of archaic formulas perpetuating the land tabu.

Among the cases relied on by the Court to show that the principle of finality had already been extended to judgments sustaining the competency of the rendering court were divorce cases; and this pointedly raises the question whether the principle is to gain in breadth because of its association with those cases or whether, on the other hand, the principle as applied to divorce cases is to be circumscribed by the emphasis in *Durfee v. Duke* on actual litigation of the jurisdictional issue. Mr. Justice Stewart cited *Davis v. Davis*,[65] in which the issue of domicile had been actually litigated, and *Sherrer v. Sherrer*,[66] in which domicile had been put in issue by an answer denying the allegations of the complaint. He did not cite *Coe v. Coe*,[67] in which the answer admitted the allegation of domicile, nor *Johnson v. Muelberger*,[68] in which the defendant appeared and contested the merits but not the question of jurisdiction, nor *Cook v. Cook*,[69] in which, in the absence of evidence that the defendant spouse had appeared or had been served, the Court presumed that he had done whatever was necessary to give conclusive effect to the decree, strongly intimating that mere appearance or personal service would suffice. But it would probably be a mistake to expect anything like complete parallelism between the divorce cases and other cases on the finality of jurisdictional determinations.

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62 RESTATEMENT, CONFLICT OF LAWS § 451(2) (Supp. 1948); *cf.* RESTATEMENT, JUDGMENTS § 10 (1942).

63 375 U.S. at 114 n.12.

64 Goodrich, J., in Caterpillar Tractor Co. v. International Harvester Co., 120 F. 2d 82, 84 (3d Cir. 1941).

65 305 U.S. 32 (1938).

66 334 U.S. 343 (1948).

67 334 U.S. 378 (1948).

68 340 U.S. 581 (1951).

69 342 U.S. 126 (1951).

Certainly it would be rash to read *Durfee* as impairing the *Coe*, *Johnson*, and *Cook* cases by injecting a requirement that the domicile issue be actually contested; and in non-divorce cases the presence or absence of an actual contest will probably continue to figure ouly as one of the factors to be considered. My own view is that the divorce cases are sui generis, and that, although Mr. Justice Stewart said that "Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States,"[70] the truth may be that jurisdiction to divorce exists whenever there is a *finding* of domicile coupled with jurisdiction of the defendant spouse.[71]

Welcome as the decision is, I find cause for regret in two of its aspects. It was unnecessary and regressive to reiterate the Court's "emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States,"[72] and to cite approvingly the thoroughly discredited case of *Fall v. Eastin*.[73] This, of course, was obiter dictum, a luxury in which one is tempted to indulge when one's position is strong enough to inspire confidence that concessions can be made with safety. But such references to cases of a totally different sort are dangerous still. No doubt the Nebraska court, had it believed that the land was in Missouri, would have dismissed the action to quiet title; but many a court, settling the rights of its domiciliaries in a divorce case, will reasonably wish to require the husband to make a conveyance of land in another state, as in the *Fall* case, and its judgment to that effect ought to be respected.

Mr. Justice Black concurred in the judgment only "with the understanding that we are not deciding the question whether the respondent [Duke] would continue to be bound by the Nebraska judgment should it later be authoritatively decided, either in an original proceeding between the States in this Court or by a compact between the two states under Art. I, § 10, that the disputed

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[70] 375 U.S. at 115.

[71] *Cf.* Cheever v. Wilson, 9 Wall. 108 (1869). See Comment, *Stranger Attack on Sister-State Decrees of Divorce*, 24 U. CHI. L. REV. 376 (1957).

[72] 375 U.S. at 115.

[73] *Id.* at 115 n.14. See Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

tract is in Missouri."[74] My understanding of the effect of the decision is exactly the opposite. Of course, as the majority recognized, the judgment could not affect the rights of the states; they remained free to litigate the boundary question in an original action, or to negotiate it and resolve it by compact. It is inconceivable to me, however, that the judgment in a subsequent action between the states—to say nothing of a subsequent negotiated settlement—could be allowed to upset the private rights secured by the Nebraska judgment.[75] Such a result could be founded ouly on the patent fallacy that the rights of the parties depend on the objective existence of the determinative facts, as divined by some omniscient agency.[76] They do not. They rest on judicial findings arrived at by due process of law, whether the findings are one with ultimate truth or not. I regret this weakening of the principle of res judicata in the context of a decision that greatly strengthens it; I should think Durfee would regret even more the cloud thus cast on his title.[77]

C. CUSTODY DECREES—THE FORD CASE

Ford v. Ford[78] is the Supreme Court's fourth encounter with the problem of full faith and credit to child custody decrees. Standing alone, the decision contributes little to the meager store of authoritative pronouncements on the subject; read in the light of the three earlier cases, however, it emphasizes the difficulty of the position in which the Court is placed by congressional oversimplification of the problem of full faith and credit to judgments. Rather clearly, the Court is reluctant to hold that custody decrees are entitled to con-

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[74] 375 U.S. at 117.

[75] *Cf.* Reed v. Allen, 286 U.S. 191 (1932).

[76] *Cf.* Miller v. Horton, 152 Mass. 540 (1891).

[77] A minor matter for regret is the probably heedless statement that "full faith and credit thus generally requires every State to give a jndgment *at least* the *res judicata* effect which the judgment would be accorded in the State which rendered it." 375 U.S. at 109. (Emphasis added.) Bnt a state is not required, and may not be permitted, to give a judgment greater force than it has in the state of its rendition. Note the statutory language, 28 U.S.C. § 1738; see CURRIE 679–80; Board of Public Works v. Columbia College, 17 Wall. 521 (1873); Halvey v. Halvey, 330 U.S. 610, 621 (1947) (concurring opinion).

[78] 371 U.S. 187 (1962).

clusive effect in other states, for the simple reason that no prudent and humane society could tolerate such a rule; yet Congress, which has power to "prescribe . . . the Effect" of such decrees, has limited itself to the categorical statement that, like judgments for money, such "records and judicial proceedings . . . shall have the same full faith and credit . . . as they have by law or usage" in the rendering state.[79] Of course, the Court could carve out an exception for custody decrees, and some day it may be forced to do so. *Ford v. Ford* itself suggests the way in which this might be done, thereby, perhaps, prudently laying a foundation for future action when it is required. But rather obviously such an exception requires the exercise of legislative judgment, and that in a matter with respect to which Congress has acted, though without adequate consideration.[80] Is it unreasonable to suggest that Congress should relieve the Court of this embarrassment?

The *Ford* case began with a habeas corpus proceeding in Virginia brought by the husband. The wife answered; both parties were represented by counsel; negotiations resulted in an agreement that the husband was to have custody while school was in session, the wife during vacation periods. Being informed that this agreement had been made (but not of its contents), the court entered an order dismissing the action. Later the wife filed suit in South Carolina and the domestic relations court awarded custody to her. On appeal the court of common pleas modified the judgment to give custody to the mother during school terms, to the father during vacations (the converse of the Virginia arrangement). The South Carolina Supreme Court reversed, holding that the agreement and dismissal amounted to a consent judgment which under Virginia law was res judicata in the absence of changed circumstances, and that full faith and credit required that it be treated as conclusive.[81] The Supreme Court reversed, Mr. Justice Black writing the opinion. Examining the law of Virginia for itself, the Court concluded that the consent dismissal would not be treated as res judicata by the

[79] 28 U.S.C. § 1738.

[80] The implementing act has been little changed since its original enactment in 1790. At that time it seems that custody decrees, at least as we know them, were practically unknown. See EHRENZWEIG, CONFLICT OF LAWS 287 (1962).

[81] Ford v. Ford, 239 S.C. 305 (1961). One Justice dissented.

courts of that state, since the court had neither examined the terms of the agreement nor exercised its judgment as to the welfare of the children. "All of the Virginia cases discussed by the South Carolina court . . . involved purely private controversies which private litigants can settle, and none involved the custody of children where the public interest is strong. . . . Whatever the effect given such dismissals where only private interests of parties are involved, cases involving custody of children raise very different considerations."[82] Since the Full Faith and Credit Clause would require South Carolina to treat the judgment as conclusive only if Virginia would so regard it, the Court did not reach the question whether the clause applies to custody decrees, and left that question open, as it had previously done.[83]

The significance of the case lies not in what it decided but in what it did not decide. It is not remarkable that the state court's decision was reversed although it upheld a right asserted under the Constitution. Since 1914 the Court has had appellate jurisdiction to decide whether such rights are upheld or denied.[84] It is not remarkable that the Court inquired into Virginia law and reversed because the South Carolina court had misinterpreted that law. Since the deference owed to the judgment of another state depends on the law of that state, the correct interpretation of that law becomes, for the case at hand, a federal question. The practice is familiar when the Court finds that the judgment has been given less effect than it was entitled to by the law of the rendering state.[85] And no eyebrows were raised on this account when, in *Aldrich v. Aldrich*,[86] the

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[82] 371 U.S. at 192.

[83] *Ibid.* On remand the South Carolina Supreme Court adhered to its former judgment, holding that an agreement between the parents on custody will ordinarily be respected; that the agreement here was in the best interests of the children when made; and that there was no showing that this was no longer true. Ford v. Ford, 242 S.C. 344 (1963). The same result followed in North Carolina, where a disposition of the custody question incident to the divorce action had been stayed pending the Supreme Court's decision. Ford v. Ford, 260 N.C. 433 (1963).

[84] Act of December 23, 1914, ch. 2, 38 Stat. 790, 28 U.S.C. § 1257(3). See also May v. Anderson, 345 U.S. 528 (1953), discussed below.

[85] See Barber v. Barber, 323 U.S. 77 (1944), reversing the Tennessee court upon a finding that under North Carolina law a decree for alimony was not modifiable as to accrued installments.

[86] See text at note 34 *supra*.

Court invoked the aid of the supreme court of the rendering state in its inquiry into the status of the judgment under local law. What is remarkable is that, at this late date, and despite the categorical language of the implementing act, the Court still shuns a holding that the Full Faith and Credit Clause applies to a custody decree.[87]

In *Halvey v. Halvey*,[88] the first of the decisions concerned with the problem, the Court sustained the power of New York to make a custody award departing from the terms of a Florida decree, finding that under Florida law the decree was modifiable not only upon a showing of changed circumstances but in the light of facts not presented or considered at the Florida hearing. "[I]t 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."[89] Whether it has greater leeway was one of the problems on which decision was expressly reserved.[90] Mr. Justice Jackson concurred on the ground that the record did not show that the Florida court had jurisdiction. Mr. Justice Frankfurter concurred on the ground that, the jurisdiction of the Florida court being doubtfnl, New York was free to exercise its judgment as to the child's welfare, apparently feeling that but for this doubt New York would be bound to respect the Florida decree in the absence of changed circumstances.[91] Mr. Justice Rutledge concurred *dubitante*, agreeing that the decree was not res judicata under Florida law but expressing concern over the prospect of repeated litigation if such decrees generally should be deprived of full faith and credit.[92]

No majority agreed on the reasons for the decision in *May v.*

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87 "Whether the South Carolina court's interpretation of the Full Faith and Credit Clause is a correct one is a question we have previously reserved. We need not reach that question here. The Full Faith and Credit Clause, *if applicable to a custody decree . . .*" 371 U.S. at 192. (Emphasis added.)

88 330 U.S. 610 (1947). 89 *Id.* at 615.

90 *Id.* at 615–16. In any plenary study of custody decrees detailed attention must of course be given to the facts of the cases, especially those bearing on jurisdiction. For purposes of the single point to be made here, however, that seems unnecessary.

91 *Id.* at 616. He was disregarding the Florida law, but apparently was not satisfied, as was Mr. Justice Douglas, that Florida would permit modification in the absence of changed circumstances. *Id.* at 619.

92 *Id.* at 619.

Anderson.[93] Mr. Justice Burton wrote the opinion of the Court, joined by Chief Justice Vinson and Justices Black and Douglas. It held that Wisconsin, assuming it to be the domicile of the children as well as of the father, could not bind the mother by a custody decree in a proceeding to which she was not a party, and that the Ohio court in a habeas corpus proceeding erred in treating such a decree as entitled to full faith and credit. My own belief is that the decision is narrowly limited by the circumstances of the case. In Ohio habeas corpus was an appropriate procedure only for determining the right to immediate possession of the child; it was not appropriate for plenary settlement of the question of custody, nor for modification of any prior decree, and no showing of changed circumstances was permitted. On the reasonable assumption that the prior decree was modifiable at least on a showing of changed circumstances in the state of its rendition, Ohio thus gave it greater binding force than it was intended to have, and deprived the mother of any day in court at all.[94] Mr. Justice Frankfurter, concurring, changed his position as announced in the *Halvey* case: the holding of the Court was not, according to him, that the Wisconsin decree was void, so that Ohio was precluded from honoring it; the decision was merely that the Full Faith and Credit Clause did not require Ohio to treat the decree as conclusive. "But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."[95] It is difficnlt, however, to read the opinion of the Court as based on other than due-process grounds, and in my view also the justification for the decision lies in the fact that it corrected a denial of due process—though it was Ohio more than Wisconsin that was responsible. Justices Jackson and Reed, dissenting, asserted that the necessary ground for the decision was a lack of jurisdiction in the Wisconsin court; that Wisconsin, as the domicile of the father and children, had jurisdiction; and that the decree was entitled to full faith and credit. Yet even they added:[96] "And, of course, no judgment settling custody rights as between the parents would itself prevent any state which may find itself responsible for the welfare

[93] 345 U.S. 528 (1953).

[94] See CURRIE 677–80.

[95] 345 U.S. at 536.

[96] *Id.* at 542.

of the children from taking action adverse to either parent." Their final conclusion, however, was that Ohio should be required to respect the judgment of the Wisconsin court "until it or some other court with equal or better claims to jurisdiction shall modify it."[97] This, of course, is a regression from the *Halvey* principle that if the decree is modifiable by the law of the rendering state the forum itself may modify it. Mr. Justice Minton dissented on the narrow ground that the validity of the decree was not before the Court, not having been challenged by any pleading; in his view, the decree was entitled to full faith and credit.[98] Mr. Justice Clark did not participate in the decision.

In *Kovacs v. Brewer*[99] North Carolina had refused to recognize a modified custody decree entered by the New York court on the ground that New York lacked jurisdiction, the child at the time of modification being in North Carolina rather than New York. The North Carolina trial court's decision on the merits had been made on the basis of evidence relating to conditions existing both at the time of the decree and thereafter. Concededly, New York law permitted modification of the decree at least on a showing of changed circumstances. Rather than decide the constitutional questions unnecessarily, the Court, in an opinion by Mr. Justice Black, remanded for clarification so that the North Carolina court might, if it had not already done so, consider the issue of changed circumstances. Mr. Justice Frankfurter dissented vigorously, protesting against what he considered to be an implied endorsement of a requirement of full faith and credit unless the illusory test of changed circumstances were met (though it seems clear that no such implication was intended), and called flatly for a ruling that the Full Faith and Credit Clause does not apply to custody decrees. For emphasis, he argued that the New York decree should not be binding in North Carolina for reasons suggestive of a defect of jurisdiction in the New York court:[100]

> The minimum nexus between court and child that must exist before the court's award of the child's custody should carry

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[97] *Ibid.* [98] *Id.* at 542–43. [99] 356 U.S. 604 (1958).

[100] 356 U.S. at 613–14. On remand the North Carolina court, being informed that the father had died, found that the case was moot. Kovacs v. Brewer, 248 N.C. 742 (1958).

> any authority is that the court should have been in a position adequately to inform itself regarding the needs and desires of the child, of what is in the child's best interests. And the very least that should be expected in order that the investigation be responsibly thorough and enlightening is that the child be physically within the jurisdiction of the court and so available as a source for arriving at Solomon's judgment.

These cases make it reasonably clear that the Court is not going to hold that custody decrees are entitled to full faith and credit.[101] If forced to do so it will hold, as the New York Court of Appeals has rather brashly done, that "the full faith and credit clause does not apply to custody decrees."[102] This would be unfortunate, not simply because it would amount to judicial legislation, but because judicially created exceptions to the command of full faith and credit are undesirable; the modern trend has been to eliminate such exceptions, not to multiply them. This is not to say that custody decrees should be given conclusive effect, but only that Congress, not the Court, should take the necessary corrective action. The Full Faith and Credit Clause does, indeed, apply to custody decrees, if we are to speak accurately; but by that clause Congress is empowered to prescribe their effect in other states. It should do so. It could do so by adding a simple proviso to § 1738 of the Judicial Code to the effect that no judgment shall preclude the courts of a state having a legitimate interest in the matter from making whatever custodial decree is required, in their judgment and discretion, for the welfare of the child.[103] This would not mean that the decree of a sister state would be rendered meaningless. The decree and the status quo established by it remain "among the relevant and even important circumstances that a court should consider when exer-

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[101] Moreover, while denial of certiorari does not imply approval of the judgment below, it may indicate a reluctance to resolve the issue; and the Court has had occasion to deny certiorari in custody cases. See, *e.g.*, Stout v. Pate, 120 Cal. App. 2d 699, *cert. denied*, 347 U.S. 968 (1954); Pate v. Stout, 209 Ga. 786, *cert. denied*, 347 U.S. 968 (1954).

[102] Bachman v. Mejias, 1 N.Y. 2d 575, 580 (1956).

[103] Perhaps the proviso might be drafted so as to give this discretion only to a state in which the child is physically present, following Mr. Justice Frankfurter's suggestion of a "minimum nexus." See text at note 100 *supra*. The full benefits of the amendment would be best realized, however, if the requirement of full faith and credit were removed altogether.

cising a judgment on what the welfare of a child before it requires";[104] the decree should be entitled to "respectful consideration."[105]

This would not mean, either, that the interstate problems of child custody would be solved. Unfortunately there will continue to be, as there long have been, repetitious lawsuits and abductions undeniably harmful to the stability and welfare of the child. But the principle of full faith and credit has not been helpful in preventing such disorders; it has only embarrassed the courts in their efforts to deal with the problem. There will be hard cases, as where the losing parent, merely because he is dissatisfied with the outcome, abducts the child and, in violation of an injunction, spirits it to another state.[106] Such problems are better dealt with on equitable principles than on the basis of rigid formulas;[107] yet even in the most flagrant cases the impulse to punish must be subordinated to the welfare of the child.

Conceivably Congress might undertake a more elaborate solution. Such a solution has recently been proposed by Professor Leonard G. Ratner, of the University of Southern California, though in the form of a blueprint for judicial rather than legislative action.[108] The proposal is in the main a restriction of jurisdiction to make an initial determination of custody, or to modify a custody decree. Its core, derived from the postulate that the court most likely to decide correctly is that which has maximum access to the evidence, is that ordinarily jurisdiction exists only in the state in which

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[104] 356 U.S. at 612.

[105] Stansbury, *Custody and Maintenance across State Lines*, 10 LAW & CONTEMP. PROB. 819, 830–31 (1944); Sampsell v. Superior Court, 32 Cal. 2d 763 (1948).

[106] *Cf.* Dees v. McKenna, 261 N.C. 373 (1964). Although I believe that generally injunctions are as much entitled to full faith and credit as other judgments (see CURRIE 311 n.113), there would seem to be no way in which the forum can give effect to such a decree, since the damage has been done. Although entertaining the guilty party's plea necessarily operates as some condonation of the contempt, refusal to entertain the plea would not really vindicate the injunction, and might jeopardize the child's welfare for the sake of punishment.

[107] See EHRENZWEIG, CONFLICT OF LAWS 287–300 (1962).

[108] *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964). Slighting the powers of Congress under the Full Faith and Credit Clause, Professor Ratner assumes that "ouly the Supreme Court can authoritatively resolve" interstate custody problems. *Id.* at 798–99; *cf. id.* at 827 n.153.

the child has an "established home"—*i.e.*, where the child has resided for six months with a parent or a person acting as parent. The state where a child is physically present is conceded an interest in the child's welfare, "[b]ut an interest in the child cannot justify the exercise of custody jurisdiction."[109] Such a state is conceded authority only to remove the child from the possession of a person who is "mistreating or abusing" it.[110] Full faith and credit would be required to any custody decree rendered by a court having jurisdiction as defined, though the meaning—but not the confusing effect—of this requirement is almost totally destroyed by the qualification that the forum may consider not only changed circumstances but earlier evidence not presented to the rendering court, whatever the law of the rendering state.[111]

Even if, as Professor Ratner believes, the achievement of this solution is "not beyond the judicial capacity,"[112] surely the proposal is unwise and unacceptable, and the effort serves mainly to demonstrate the probable inadequacy of any academic, judicial, or other sketchily informed effort to regulate this complex matter by detailed rules of jurisdiction and full faith and credit. Although the article is apparently written against the background of some experience with custody problems in practice, the proposal is clearly regressive in comparison with the permissive solution reached in *Sampsell v. Superior Court.*[113] The denial of jurisdiction to the state in which the child is physically present rejects the considerable element of wisdom in Mr. Justice Frankfurter's view that the presence of the child is critical for "the conscientious efforts that most state courts expend to carry out their functions in child custody cases in a responsible way."[114] It iguores the "cold fact" that the state in which the child and its actual custodian are can deal with them directly and effectively, while other states may be powerless to enforce their orders.[115] It would inflict an intolerable disability:[116]

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109 *Id.* at 812.

110 *Id.* at 842.

111 *Id.* at 836, 842.

112 *Id.* at 827.

113 Note 105 *supra.*

114 Kovacs v. Brewer, 356 U.S. 604, 614 (1958) (dissenting).

115 Stansbury, *Custody and Maintenance across State Lines,* 10 LAW & CONTEMP. PROB. 819, 823 (1944).

116 *Id.* at 825.

"Must the courts of [the state where the child is physically present] sit with their hands folded and watch the warring parents seize the child from each other in unguarded moments?" If there is to be detailed regulation of this subject it ought to come only from Congress, which alone has the facilities to bring to bear widespread and varied experience and the relevant sociological and psychological, as well as legal, learning.

D. OTHER OPPORTUNITIES FOR CONGRESSIONAL AID: THREE OLDER CASES

1. *Child Support: The* Yarborough *Case.*—A Georgia court in a divorce case purported to discharge the father's obligation to support his minor child upon his paying $1,750 to a trustee for that purpose. Later, residing in South Carolina, the child sought additional support. The Court held that full faith and credit precluded South Carolina from imposing any further obligation on the father[117]—a perfectly outrageous result but one that, despite Mr. Justice Stone's impassioned dissent (joined by Mr. Justice Cardozo) seems required by the categorical language of the act of Congress. Clearly no state should thus be allowed to interfere with the important interest of another state in child support. The evil is easily remediable by a simple proviso to § 1738 of the Judicial Code to the effect that no judgment fixing or terminating the obligation of a parent to support his minor child shall preclude any other state having an interest in the matter from requiring further support. In the process it would be well to include the obligation of a husband to support his wife.

2. *Workmen's Compensation: The* McCartin *Case.*—In *Magnolia Petroleum Co. v. Hunt*[118] the Court held, in an opinion by Mr. Justice Stone, with Justices Douglas, Murphy, and Black dissenting, that a workman's compensation award in the state of injury, by whose law it was exclusive, had the effect under the Full Faith and Credit Clause of precluding a further award in the state of employment and residence. For reasons that are forcefully stated in the dissenting opinion of Mr. Justice Black, this is an unfortunate result; sound national policy hardly requires that one state be permitted thus to trench on the policy of another interested state in the matter

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

118 320 U.S. 430 (1943).

of industrial injuries. A few years later the *Hunt* case was sterilized as a precedent. *Industrial Commission of Wisconsin v. McCartin*[119] held that an award by the state of employment and residence did not preclude a further award in the state of injury. The Court found in Illinois' statute and decisional law no provision forbidding the employee to seek relief under the law of another state, although the statute contained an exclusive-remedy provision similar to that of the Texas statute involved in the *Hunt* case (both designed, no doubt, solely to abolish common-law and other statutory remedies against the employer). Moreover, the award itself provided that it should be without prejudice to the employee's rights under Wisconsin law.[120] But these grounds seem inadequate to support the decision. If the judgment had the effect of precluding any further recovery for the same injury in Illinois, it should, under the act of Congress, have the same effect in Wisconsin. The emphasis on what was intended by the legislature and the Industrial Commission of Illinois was misplaced. Illinois may determine, of course, the effect of its judgments and awards in Illinois; their effect in other states is a federal question.[121] Here, it appears, the Court has reached a desirable result at some expense in terms of judicial candor and fidelity to statutory language. The problem is not urgent, as it is with respect to custody decrees; but since the *Hunt* case was not overruled there may be justification for a clarifying amendment to § 1738 to insure that an award in one state will not preclude a further award in another interested state.

3. *Forum Non Conveniens: The* Anglo-American *Case.*—In *Anglo-American Provision Co. v. Davis Provision Co., No. 1*[122] the Court held in an opinion by Mr. Justice Holmes that the Full Faith

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[119] 330 U.S. 622 (1947).

[120] It did so because it incorporated a settlement agreement between the parties containing that provision. On this basis alone the result may be justified, for there seems no reason why the parties, in a settlement contract, should not agree on a limited effect for the judgment confirming it. But this was only an alternate ground for the decision. Emphasis was placed primarily on the permissiveness of Illinois law and secondarily on the fact that the limitation was contained in the judgment as such.

[121] See Reese and Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 161–62 (1949). A similar emphasis on the extraterritorial effect contemplated by the rendering state appears in the dissenting opinion of Mr. Justice Stone in *Yarborough*, 290 U.S. at 213.

[122] 191 U.S. 373 (1903), discussed in CURRIE at 330–33.

and Credit Clause did not require New York to entertain a suit by one Illinois corporation against another to enforce an Illinois judgment for money founded on an ordinary commercial claim. The New York statute embodying the doctrine of forum non conveniens was designed simply to relieve New York courts of the burdens of litigation between nonresidents. That New York has an interest in so protecting its courts is undeniable. The judgment defendant, however, was insolvent, and was proceeding in New York to enforce a New York judgment against the plaintiff; the plaintiff's purpose in suing on the Illinois judgment was simply to establish it as a set-off. The result reached was thus indefensible in terms of justice. By the same token a judgment creditor could be denied relief by the ouly state in which the judgment debtor has assets. A sound political judgment would be that the national interest in the uniform enforceability of judgments clearly outweighs the interest of New York in keeping its dockets clear of foreign litigation; the burden of litigation to enforce a judgment are light, and the need for nationwide enforcement is great. Congress has, in the implementing act, already made that political judgment. The foundation for the decision departing from it—that full faith and credit does not require a state to provide a forum—was destroyed by Mr. Justice Holmes himself.[123] Tlie Court, given the occasion, could and probably would itself correct this anomaly; all that is required is more faithful adherence to the existing act of Congress. But if Congress should legislate on full faith and credit at all it should not wait for the Court to rectify a holding that has been a potential source of injustice for sixty-one years.

The Court has refrained from holding that custody decrees are entitled to full faith and credit, and is under strong pressure to hold that they are not, thus making an exception where Congress has made none. It has been faithful to the statutory requirement of full faith and credit in the matter of child support, producing a result that is lamentable in terms of national policy. It has in effect carved out an exception for workmen's compensation awards, thus reaching a result consistent with sound national policy without conspicuous fidelity to the act of Congress. Finally, it has carved out an ex-

[123] Kenney v. Supreme Lodge, Loyal Order of Moose, 252 U.S. 411 (1920).

ception that is inconsistent with the most elementary component of the national policy involved—permitting a state to refuse enforcement of the money judgment of a sister state merely because it would take a little time and effort. There are many other matters relating to full faith and credit on which Congress might make a useful contribution if it were willing to give some attention to ordinary matters of law and justice. Is it completely unrealistic to hope that it will do so?