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FALSE CONFLICTS AND INTERSTATE PRECLUSION: MOVING BEYOND A WOODEN READING OF THE FULL FAITH AND CREDIT STATUTE

SANFORD N. CAUST-ELLENBOGEN*

INTRODUCTION

THE full faith and credit clause of the Constitution and the full faith and credit statute govern the manner in which judgments rendered in one state are recognized and enforced in sister states. Recently, the Supreme Court appears to have adopted a reading of the full faith and credit statute that requires state or federal courts to give a state court judgment the same preclusive effect as the rendering court would. The Court appears to derive its reading from the plain language of the full faith and credit statute. It is far from clear, however, that a “plain reading” of the full faith and credit statute is either necessary or desirable.

When a court is asked to recognize a prior judgment in an ongoing proceeding, it must make a series of determinations about the quality and

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1. The full faith and credit clause provides: “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.” U.S. Const. art. IV, § 1.

2. The full faith and credit statute provides that the legislative acts, and the records and judicial proceedings of any court, of any state, territory or possession of the United States “shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” 28 U.S.C. § 1738 (1982).

3. The Second Restatement of Conflict of Laws distinguishes between the recognition of judgments and the enforcement of judgments. See Restatement (Second) of Conflict of Laws §§ 93-98 (1971) (recognition of foreign judgments); id. §§ 99-102 (enforcement of foreign judgments). A judgment is said to be enforced when relief is granted solely on the basis of the prior judgment. See id. at 302-03. All other situations in which a prior judgment is given some preclusive effect in a subsequent litigation involve the recognition of the prior judgment. This Article uses the term recognition to describe the entire range of possible preclusive effects of a prior judgment, including the enforcement of the judgment.


5. See Marrese, 470 U.S. at 380-86.
content of the prior judgment and the effect that the judgment should have in the ongoing proceeding. These determinations are shaped by an assessment of several factors including fairness to the litigants in the proceedings, effectuation of the substantive policies of the forum and efficient use of court resources. When the prior judgment is rendered by a different court system than the one in which recognition is sought, an additional level of concerns is added: a choice of law question is presented with regard to the appropriate rules of preclusion. The nation's courts need choice of law rules that address the federal concerns that prompted the framers to adopt the full faith and credit clause and that consider, to the extent possible, the interest of the states in which the judgment is rendered and recognized in the operation of their court systems.

The effect of the Supreme Court's reading of the full faith and credit statute is to impose a particular choice of law rule in situations of interstate judgment recognition: the state of recognition is to apply the preclusion law of the state of rendition when determining the preclusive effect of a judgment rendered by that state. This reading of the full faith and credit statute is not compelled by the history and usage of the statute and the constitutional provision that it seeks to implement. In addition, it fails to address and accommodate the federal and state interests inherent in a question of interstate judgment recognition.6

To be fair, although the Supreme Court has often used its plain reading approach to the full faith and credit statute in its pronouncements on interstate preclusion,7 some of its decisions are difficult to reconcile with the plain reading view.8 This suggests that the Court recognizes that, at least in certain situations, the plain reading approach is not an appropriate solution to the interstate judgment recognition problem. The pattern of a predominant rule with a set of exceptions also suggests that a theory can be developed that accounts for both the predominant pattern and the exceptions in a unified way. Such a theory adds coherence to the law and provides greater guidance for application of interstate preclusion doctrine to new situations.9

This Article proposes a choice of law rule governing interstate preclusion...
sion that attempts to further federal values in interstate judgment preclusion while accommodating, to the extent possible, the interests of the affected states. Part I of this Article discusses the values served by preclusion law, in general, and preclusion by judgment, in particular, and the additional values implicated when interstate judgment preclusion is involved. Because of the importance of due process concerns in shaping concepts of preclusion and choice of law, this Part also addresses the relevance of the due process clause to the interstate judgment preclusion problem. Part II then evaluates the plain reading approach as a possible choice of law rule for the interstate judgment preclusion problem, concluding that the plain reading approach is neither required by the full faith and credit clause or statute, nor does it adequately serve the values implicated by the interstate judgment preclusion problem. After canvassing Supreme Court doctrine on interstate judgment preclusion in Part III, the Article proposes in Part IV an alternative reading of the full faith and credit statute that meshes with the outcomes of the decided cases and that better accommodates the interests of the states, the federal government and the policies of preclusion law than does the current patchwork of a plain reading approach with limited exceptions. The Article argues in Part IV that the state of recognition should apply the preclusion law of the state of rendition only when the state of rendition has an interest in having its preclusion law applied. In all other situations, the state of recognition is free to apply its own choice of law rule to the preclusion law problem. This approach is then applied in a variety of contexts.

The approach suggested by this Article would not result in a radical alteration in the outcome of most cases. Despite the lack of a unified theory of interstate preclusion, the Supreme Court's approach produces sensible results in most cases. There are some situations, however, in which the plain reading approach makes little sense as a choice of law rule. This Article's proposal would enable state courts to avoid some of the needlessly harsh results that follow from the Court's plain reading approach, while providing a unifying theory for the various exceptions that currently litter the area of interstate judgment recognition.

10. See infra notes 19-57 and accompanying text.
11. See infra notes 59-70 and accompanying text.
12. See infra notes 71-91 and accompanying text.
13. See infra notes 92-140 and accompanying text.
14. See infra notes 141-143 and accompanying text.
15. See infra notes 144-260 and accompanying text.
16. See infra notes 261-266 and accompanying text.
17. See infra notes 267-286 and accompanying text.
18. As Professor Smith concluded:
   The concept of full faith and credit that emerges from [a] review of Supreme Court decisions is not unitary. It reflects different accommodations made by the Court between full faith and credit and other state and federal interests. The Court has not developed a consistent doctrine of exceptions, but has operated largely on an ad hoc basis because of the lack of textual support for excep-
I. PRECLUSION LAW, CHOICE OF LAW, AND FULL FAITH AND CREDIT

The full faith and credit to judgments problem involves an overlay of choice of law and preclusion law issues. When a court is asked to recognize a prior judgment, a set of preclusion law issues are raised. The court must determine whether the prior judgment is of a sufficient quality to give rise to preclusive effect, determine the content of the prior judgment, and determine what preclusive effect, if any, the prior judgment should have on the ongoing proceeding. Imbedded in the rules governing these determinations are assessments of sometimes competing adjudicative values relating to the use of court resources, fairness to the litigants, and the development of accurate legal and factual determinations.

When the court of rendition is different from the court of recognition, an additional layer of issues is presented. The court of recognition must make a choice of law determination with regard to which regime of preclusion law it will apply in evaluating the prior judgment. This would be a purely theoretical problem if preclusion law were uniform across court systems. In fact, preclusion law is far from uniform. Thus, the choice of the preclusion law to be applied to a judgment can significantly alter its preclusive effect.

This section sets forth a theoretical foundation for the consideration of choice of law models for preclusion law problems. First, it discusses principles and policies of preclusion law. The Article then considers the relevant federal and state policies raised by the interstate preclusion problem. Finally, this section discusses the applicability of the due process clause as a constraint on choice of law in the interstate preclusion area.

A. Preclusion Law Values

Preclusion by judgment is one of several devices that foreclose full consideration of legal or factual issues. Although particular preclusion rules vary across devices and across judicial systems, they are all consequences to section 1738 and disagreement over the exceptions' scope and justification. Smith, supra note 6, at 82.

19. In some situations, however, the very fact that the judgment presented for recognition is foreign can affect the court of recognition's posture towards the judgment. The propriety of treating a foreign judgment differently than a domestic judgment is discussed infra at text accompanying notes 267-273.


quences of a judicial system's evaluation and weighing of adjudicative and substantive values.

One factor driving preclusion doctrines is the perceived need for the finality in judicial determinations. Courts, having decided an issue, do not wish to reexamine it, absent compelling circumstances. Such a refusal conserves judicial resources, but at the potential expense of the accuracy of the decision, fairness and parties' interests in having an opportunity to be heard. Thus, the value of finality must be weighed against these and other adjudicatory values.

Consider a factual determination—the cause of an airline accident. Typically, a determination of the cause of the accident binds the same parties in any subsequent actions. However, courts are divided as to whether the determination is binding in subsequent actions involving different litigants. Courts adhering to the traditional rule, that parties may be bound only by determinations in actions between the same parties, are subordinating finality values to other adjudicatory values, such as fairness and accuracy. Parties who were not involved in the prior adjudication are not bound by it, even in those jurisdictions that have abandoned the mutuality requirement, because of due process values.

There are exceptions to preclusion, even for parties involved in the original litigation. For example, a party might be able to obtain relief from a judgment by establishing that the prior determination was obtained through fraud, or if there is newly discovered evidence. In such situations, the court subordinates its interest in finality to competing in-

22. See Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931) ("Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.").
23. See Restatement (Second) of Judgments § 27 (1982).
25. See generally C. Wright, A. Miller & E. Cooper, 18 Federal Practice & Procedure § 4464, at 583 (1981). The usual reason given for requiring mutuality of estoppel is that it would be unfair to bind one party to the results of a prior adjudication without also binding the other party to the current litigation to the results of the prior adjudication. Due process prevents a party from being bound by the results of an adjudication in which they did not have an opportunity to be heard. See, e.g., Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973), cert. denied, 416 U.S. 956 (1974).
26. See supra note 25.
27. See, e.g., Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 526 (1931) (collateral attack on jurisdiction allowed in the case of fraud); see also Fed. R. Civ. P. 60(b) (fraud or newly discovered evidence among grounds for relief from judgment).
Parties affected by litigation also have an interest in finality. A losing party in a lawsuit is not likely to act in conformity with the judgment if it is vulnerable to collateral attack. People must be able to act with some assurance that what has been decided will remain decided. These expectations in the state of the law are carried beyond the parties to a litigation through the doctrine of stare decisis. Once a relevant court has decided a legal issue, expectations are developed in reliance of that rule of law. Precedents can be reversed if they are plainly wrong; relief can be obtained from a judgment when enforcing it would be unfair to the losing party; nonparties are not bound by the results of prior adjudication because it is unfair to bind a party to a result without affording that party an opportunity to be heard.

Some preclusion rules, most notably the doctrines of merger and bar, seek to ensure the efficient resolution of disputes by forcing the consideration of related matters into a single case. Again, however, the doctrines of merger and bar are tempered by other concerns. Forcing claims to be litigated together interferes with the ability of parties to control their lawsuits. For example, compulsory counterclaim and cross-claim rules have the effect of forcing defendants to raise claims in forums and contexts that are not of their choosing. Courts have reached different accommodations of these competing concerns. Similarly, because of considerations of party autonomy in framing lawsuits, preclusion rules are rarely interpreted as forcing the joinder of parties in lawsuits, particularly when joinder is not possible in the forum selected.

Although efficiency concerns are often consonant with finality con-

28. The doctrine of stare decisis displays this same tension. Stare decisis generally favors finality in legal determinations, without regard to mutuality of parties, but does permit courts to reexamine "binding precedent" in the interest of accuracy of decision. See Patterson v. McLean Credit Union, 485 U.S. 617, 617-18 (1988) (per curiam). However, the presumption against overruling prior determinations is extremely strong. See, e.g., Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370-71 (1989) (although precedents are not "sacrosanct," party seeking to overrule point of statutory construction bears heavy burden); Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("any departure from the doctrine of stare decisis demands special justification").

29. See Restatement (Second) of Judgments §§ 18-20 (1982).

30. The Restatement, for example, links the necessity of bringing counterclaims, in large part, to the joinder rules of the court. See Restatement (Second) of Judgments § 22 (1982). Joinder rules vary widely as to which counterclaims, if any, are compulsory. Compare Fed. R. Civ. P. 13(a) (counterclaim compulsory if it arises out of same transaction and occurrence as an opposing party's claim) with Mich. Court Rule 2.203(B) (all counterclaims permissive). Although the Federal Rules make certain counterclaims compulsory, cross-claims are permissive. See Fed. R. Civ. P. 13(g).

31. See, e.g., Restatement (Second) of Judgments § 49 (1982) ("A judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefore."); cf. Fed. R. Civ. P. 19 (requiring court to determine whether there are non-prejudicial ways to adjudicate case before dismissing for failure to join indispensable party).
cerns, as, for example, with notions of merger and bar, they are distinct concerns that sometimes lead in different directions. For example, courts often hold that an issue must actually be litigated and necessarily decided in a prior litigation to have a preclusive effect in a subsequent litigation. This rule acknowledges that a litigant might choose to forego litigating a particular issue, and should be able to do so without risking an adverse determination in subsequent suits raising the same issue. This rule sacrifices finality for other values and appears to be inconsistent with the efficiency rationale underlying merger and bar rules. One reason for the rule is that it is not efficient for the judicial system to consider all the possible issues raised by a case; if one issue is likely to be dispositive of a case, no incentives should exist to force the consideration of other potential issues. Of course, a claim that could have been litigated, but was not, can be precluded under the doctrines of merger or bar because in that situation preclusion would foster finality and efficiency.

Similarly, the limitation of claim preclusion to claims arising out of the same transaction or occurrence can be seen as marking the limits of judicial efficiency. Finality is equally well served by extending claim preclusion to all claims involving the same parties, but finality and efficiency argue in favor of requiring that transactionally related claims be brought together. When the two values coincide, other adjudicatory values, such as party control of litigation, are outweighed.

Preclusion rules are also shaped by adjudicatory concerns that do not relate directly to the goals of preclusion law. Particularly important are the cluster of values that inform our understanding of due process. Other adjudicatory values include a concern for accuracy in determinations and a concern for the legitimacy of judicial institutions. For example, preclusion will not apply to a determination that might be faulty due to a change in law, newly discovered evidence, or proof of fraud in the prior proceeding. In all of these situations, allowing relitigation would improve the accuracy of the determination of the issue at the expense of finality. Where allowing relitigation fosters accuracy and enhances the legitimacy of judicial institutions, without unduly interfering with incentives to foster efficiency, the finality value will be trumped. But where both finality and efficiency concerns will be adversely affected, relitigation might not be allowed. Thus, the existence of newly discov-

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33. One can posit reasons sounding in fairness, for example.

34. Due process and its relationship to intersystem preclusion is discussed infra at text accompanying notes 61-77.

35. Professor Resnik has identified twelve adjudicatory values that help shape procedural rules. See Resnik, Tiers, 57 S. Cal. L. Rev. 837, 845-59 (1984). This discussion focuses on some of the same values, although the author's conception of them may well be different from that of Professor Resnik.

36. See supra note 27.
ered evidence might be grounds for avoiding preclusion, whereas a failure to present evidence in an earlier proceeding would not be.

A concern for the integrity of the courts can also override the usual preclusion concerns. For example, evidence of fraud in a prior proceeding not only casts doubt on the accuracy of the issues decided in that proceeding, but also attacks the very integrity of the court that was an unwitting partner to the fraud. Collateral attack is also often permitted against jurisdictional defects in a prior proceeding in part because a jurisdictional defect implicates the very power of the court to render a valid judgment.

B. Preclusion by Judgment

1. Types of Preclusion by Judgment

Preclusion by judgment includes the two doctrines of claim preclusion (also known as res judicata) and issue preclusion (also known as collateral estoppel), which form the bases for most uses of the full faith and credit clause and statute as applied to judgments. Within both of these doctrines, the goals of preclusion are tempered by other adjudicatory values.

The doctrine of claim preclusion regulates the effect that a prior adjudication has on the ability of a party to that litigation to raise claims or defenses that were raised, or could have been raised, in the prior adjudication. In general, a party is precluded from relitigating a claim or defense that was raised in a prior proceeding between the same parties. As a result, parties to the first action will pursue their claims with vigor knowing that the results of the litigation will stand in the future. This serves the ends of fairness, finality and efficiency. This is efficient because

37. See Restatement (Second) of Judgments § 70, at 180 (1982) ("[I]t is assumed that modern systems of procedure generally yield results that are as just as may be expected. Indeed, if this confidence did not exist, the concept of finality itself would be rationally insupportable.").

38. Another potential application of full faith and credit to judgments is raised by the credit to be given to the legal decisions rendered by courts on statutory, constitutional or common-law issues. It is unclear, for example, whether such decisions are considered to be judgments, entitled to recognition as such, or as part of the "law" of the state of the rendering court. It appears that the "law" created by the judgment is recognized, at least if the court is espousing views on the law of its own state. See Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 12 (1945). The reasoning behind this determination, however, is largely a matter of faith and the determination creates some anomalies. For example, how ought a State X court regard a decision by a State Y court on a matter of State X law? In terms of stare decisis, State X may disregard the decision. Yet if the determination were one of State Y law, the State X court would feel itself bound as if it were another State Y court.

This anomaly is further complicated by the notion that, even if the State X court is not bound by the State Y court's determination of State X law in terms of stare decisis, it is bound by the determination for purposes of claim and issue preclusion. See Fauntleroy v. Lum, 210 U.S. 230 (1908); see also infra notes 144-159 and accompanying text.

matters will tend to be definitively resolved as early as possible. It provides certainty because all parties are bound by the results of the initial determination. The application of claim preclusion is fair provided that the court that adjudicated the dispute had jurisdiction over the dispute and the parties and that each party had an adequate opportunity to be heard.\footnote{Due process requires an opportunity to be heard before a person's rights are determined by a court. See Greene v. Lindsey, 456 U.S. 444, 449 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1914).}

The doctrine of claim preclusion also provides that claims and defenses which ought to have been raised in a prior adjudication between the parties may not be raised in a subsequent adjudication between the same parties. This doctrine reflects and is facilitated by parallel developments in the areas of pleading, joinder and, in the case of the federal courts, pendant and ancillary jurisdiction.\footnote{See Restatement (Second) of Judgments 5-13 (1982). The Restatement has defined the scope of an action for purposes of preclusion in a manner consistent with the federal joinder rules and the scope of pendant and ancillary jurisdiction. Compare id. §§ 22, 24 with Fed. R. Civ. P. 13 and United Mine Workers v. Gibbs, 383 U.S. 715 (1966).}

Thus, a defendant is generally less likely to be precluded from bringing a claim in a subsequent action because of a failure to raise a counterclaim because "the defendant . . . should be allowed to bring suit at a time and place of his own selection."\footnote{See Restatement (Second) of Judgments §§ 24, 26 (1982).}

Because claim preclusion is tied to joinder rules, it reflects other concerns as well, if only indirectly. For example, because rules governing the compulsory nature of counterclaims, cross-claims and third-party claims differ from each other and from the rules of joinder of claims by the plaintiff,\footnote{Compare Fed. R. Civ. P. 13(a) (compulsory counterclaims) with Fed. R. Civ. P. 13(b) (permissive counterclaims) and Fed. R. Civ. P. 13(g) (permissive cross-claims) and Fed. R. Civ. P. 14 (permissive third party claims) and Fed. R. Civ. P. 18 (permissive joinder of claims) and Fed. R. Civ. P. 19 (necessary and indispensable joinder of parties) and Fed. R. Civ. P. 20 (permissive joinder of parties).} the preclusive effects of failure to raise a claim will also differ. Thus, the doctrine is littered with exceptions, however, which help to lessen its sting where competing values are implicated.\footnote{Restatement (Second) of Judgments § 22 comment a (1982).}

The doctrine of issue preclusion provides that all issues of fact or law litigated and determined by a final and valid judgment may not be relitigated in subsequent actions between the same parties.\footnote{See id. § 27. See generally A. Vestal, supra note 21, at V-189 to V-393 (discussing issue preclusion).}

Like claim preclusion, the notion driving issue preclusion is that it is fair and efficient to allow the parties only one opportunity to prove an issue of fact or law. The doctrine is littered with exceptions, however, which help to lessen its sting where competing values are implicated.\footnote{See, e.g., Restatement (Second) of Judgments § 27 (1982) (issue must actually be
clusion preserves litigant control of litigation strategy. An issue that could have been litigated but was not does not give rise to preclusive effect. Similarly, even issues that were actually litigated, necessarily decided and essential to the prior judgment will not give rise to issue preclusion if the importance of the issue in the latter suit was not foreseeable when the first action was litigated.

2. The Process of Preclusion by Judgment

The process of preclusion as a result of former adjudication entails three analytically distinct steps. First, the court considering the preclusion issue must decide whether to recognize the prior judgment—a determination of the quality of the judgment. Second, having decided that the prior judgment is of a sufficient quality to be recognized, the court must determine what that judgment decided—a determination of the content of the judgment. Third, the court must determine the effect that the content of a valid prior judgment should have on the ongoing litigation.

It is important to consider each step in the preclusion process separately because each serves different preclusion values and represents different tradeoffs between preclusion and other litigation values. For example, suppose that a person is injured when her motorcycle is struck by a milk delivery truck. She institutes an action against the driver of the truck for damages to her motorcycle and collects $100. Thereafter, she brings a separate action against the driver's employer for her per-

47. See id. § 27. This approach is vigorously criticized in Vestal, The Restatement (Second) of Judgments: A Modest Dissent, 66 Cornell L. Rev. 464, 473-74 (1981). But see Hazard, Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems, 66 Cornell L. Rev. 564, 577-79 (1981) (approving the approach of non-litigated issues not giving rise to preclusion). It is difficult to explain the Restatement position on the "actually litigated" requirement, given its acceptance of the idea that, in claim preclusion, unraised claims and defenses arising out of the same series of transactions are precluded by judgment. See Restatement (Second) of Judgments § 24 (1982). To the extent these two positions are reconcilable, it is largely on grounds unrelated to preclusion values.

48. See, e.g., Hyman v. Regenstein, 258 F.2d 502, 510-11 (5th Cir. 1958) (Wisdom, J.) (collateral estoppel applicable only where it was foreseeable fact would be of importance in future litigation), cert. denied, 359 U.S. 913 (1959); The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir.) (L. Hand, J.) (fact of minor legal significance to the first action might not be given preclusive effect in second action if that fact is of major legal significance to second action), cert. denied, 323 U.S. 720 (1944).

49. The chief counter-values are affording litigants an opportunity to be heard and improving the accuracy of judicial determinations. Every time a court decides to preclude litigation of an issue in an ongoing proceeding it is, implicitly or explicitly, making a determination that the party to be bound by the prior adjudication need not have an opportunity to litigate the issue and that accuracy gains, if any, to be derived from allowing litigation are offset by other values. One casebook has made this point rather dramatically by presenting preclusion doctrine in a chapter entitled "Anti-Procedure." See R. Cover, O. Fiss & J. Resnik, Procedure xv (1988).

50. The example is loosely based on Rush v. City of Maple Heights, 167 Ohio St. 221, 147 N.E.2d 599, cert. denied, 358 U.S. 814 (1958).
sonal injuries. The second court is faced with issues of validity, content and effect. First, it must determine whether the judgment is of a sufficient quality to trigger preclusion. It might ask, for example, whether the first proceeding was “final” or whether it was under appeal. It might examine whether the first court had jurisdiction over both the case and the defendant. Only after the court is satisfied that the first judgment is of a sufficient character and quality to be recognized does it go on to determine the judgment’s content and preclusive effect.

Once the court has determined that the judgment is of sufficient quality to be recognized, it must determine what the prior proceeding actually decided. It might conclude, for example, that under the applicable law drivers owe a duty of ordinary care to all persons and property located within the zone of danger surrounding their vehicle and are liable for all damages proximately caused by a breach of that duty. The court might also conclude that the prior proceeding determined that the driver of the speeding truck had failed to exercise ordinary care, that the motorcycle was within the zone of danger surrounding the truck, and that the motorcycle was damaged in the amount of $100.

A court can also make a complementary determination of what was not decided. In the example above, no determination was made concerning the motorcycle operator’s personal injuries, nor whether the employer would be liable for the $100 judgment against the employee, nor whether the motorcyclist had been contributorily negligent.

The court must then determine the preclusive effect to be given to that judgment. In the example above, the court would likely address several issues. First, should the plaintiff’s failure to raise her personal injury claim in the first proceeding preclude her from raising it in the latter proceeding? Second, should the first court’s determination that the milk truck driver had been negligent preclude an independent determination of the driver’s negligence by the second court? Finally, should the differ-

51. See generally Restatement (Second) of Judgments § 13 (1982) (res judicata applicable only where final judgment entered).

52. See generally id. §§ 4-12 (territorial and subject matter jurisdiction).

53. Most issues of judgment quality, such as consideration of whether the court of rendition had jurisdiction over the parties, the subject matter of the action and that the parties received notice of the action and an opportunity to be heard, reflect a primary concern with due process. Other issues are also concerned with the accuracy of the prior court’s determinations. For example, nonfinal judgments might be deemed not to have the requisite quality because they could be reversed at a later stage in the proceedings.

54. Of course, the determination of what was not decided should be bounded by what could have been decided. If, for example, the claim for personal injuries could not have been joined with the claim for property damage in the same suit, the fact that it was not decided in the prior adjudication may not be relevant for preclusion purposes.

The determination of the content of a prior judgment is largely a technical exercise. There are potentially troubling issues concerning the manner of proof. For example, it must be established whether the content of the judgment is to be established by the judgment or order itself, by the court’s opinion, by the entire record or by testimony. Of the three aspects of preclusion, the content of the prior judgment is the least problematic.
ence in defendants in the two suits affect the preclusive effect of the first suit?

However the court decides the first two questions of preclusive effect, the prior judgment would be recognized; in one situation to benefit the defendant, in the other to benefit the plaintiff. The problem is one of effect rather than recognition. Similarly, although the court might decide that, because of the different defendants in the two suits, the first judgment should not have preclusive effect, it has still recognized the first judgment; the court has determined that the first judgment is of sufficient quality to give rise to preclusion and, but for the differences in parties in the two actions, the content of the prior judgment would have given rise to preclusive effects.\footnote{There are many other potential issues of effect. See, e.g., Restatement (Second) of Judgments § 28 (1982) (exceptions to preclusion noted in five specific circumstances).}

It is useful to think about preclusion in terms of these three steps, particularly in the interstate context, because the rules governing each step can be animated by different concerns. For example, the quality of the judgment is likely to be largely concerned with the integrity of the judicial system that rendered the judgment and with fairness to the parties. A default judgment rendered against a defendant over whom the court lacked jurisdiction is not of a sufficient quality to be recognized because it is not fair to the defendant to be bound by a judgment that was produced without participation by the defendant and that lacks a justification for the use of coercive force against the defendant. Such a judgment similarly implicates the integrity of the court because the judgment lacks legitimacy and justification. In the interstate context, because different judicial systems render and assess the judgment, a uniform standard might be desirable to prevent either judicial system from overreaching its authority. Otherwise, a judicial system would be free to establish its own standards of quality, which might not correspond to the standards of other states. Because recognition of a prior judgment deprives a second court of the power to relitigate a question, an overbroad standard of quality would usurp the sovereign power of the court of recognition. The content of the judgment, on the other hand, is largely descriptive and rarely raises interstate recognition concerns.

The effect of the judgment raises concerns that might relate to either the court of rendition or the court of recognition.\footnote{In the ordinary preclusion issue, this inquiry is largely irrelevant because the court of rendition is in the same judicial system as the court of recognition.} For example, the issue of mutuality of estoppel, which involves an assessment of preclusion and adjudicative values by the court of recognition, is only peripherally informed by the interests of the court of rendition.\footnote{See infra notes 274-279 and accompanying text.}

C. Full Faith and Credit Values

Preclusion by judgment assumes an additional layer of complexity in
the intersystem context. Although there is substantial agreement regarding the purposes of preclusion law, its specific application varies across jurisdictions.\textsuperscript{58} Intersystem preclusion rules must create a system for determining the preclusive effect of a judgment that not only accommodates the diversity of preclusion rules, but which reflects values that are peculiar to the intersystem context as well as the value choices implicated by preclusion by judgment in general.

From a national perspective, the interstate preclusion problem can implicate interests of the federal government. First, there are some substantive concerns. Although the federal government was empowered to regulate interstate and international commerce, foreign relations and other powers,\textsuperscript{59} the states also play an important role in these areas; many state court judgments implicate these substantive interests. For example, consider a commercial transaction between citizens of different states. Although the federal government has not found it necessary or desirable to regulate these types of transactions directly, it may wish for a predictable system for the regulation and enforcement of such transactions because interstate commerce could be inhibited if state court judgments concerning commercial transactions are arbitrarily denied enforcement in other states.

This type of substantive interest is heightened when the underlying cause of action is one of federal law. Because state courts exercise concurrent jurisdiction with the federal courts with respect to many federal causes of action,\textsuperscript{60} it is likely that judgments rendered by a state court on a federal cause of action will be presented for recognition in another state's courts. The enforcement of a federal right would thus depend on the posture of the state of recognition towards the prior judgment.

Beyond these substantive values, the full faith and credit clause expresses a concern for unification across states in a federated system of government, and in that sense, serves a federal interest.\textsuperscript{61} It provides that state power, legislative or judicial, must be recognized in all other states. This structure can produce conflicts between exercises of power by different states. How these conflicts are resolved affects not only the states themselves, but the nation and its citizens.

\textsuperscript{58} See Shreve, \textit{supra} note 4, at 1216.
\textsuperscript{59} See U.S. Const. art. I, § 8.
\textsuperscript{60} Unless a statute makes federal court jurisdiction exclusive of the state courts, see, e.g., 28 U.S.C. §§ 1333, 1334, 1338 (1982), federal courts exercise their jurisdiction concurrently with the state courts. \textit{See} J. Friedenthal, M. Kane & A. Miller, \textit{supra} note 20, at 16.
\textsuperscript{61} See Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943):

The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application.

\textit{Id.} at 439.
There is, however, a competing federalism concern raised by the full faith and credit problem. Unification across states must occur at the expense of state prerogatives. A judgment by a state court not only determines the rights and obligations of the parties, but also often furthers the policy objectives of the state. Indeed, this is the major justification for the existence and power of courts. When a judgment rendered in one state is used to preclude litigation in another state, the state of recognition is deprived of its opportunity to further its own policies. The failure to recognize a sister state's judgment could frustrate the interests of the state of rendition. The problem of full faith and credit is how to resolve this conflict of state interests.

The solution to the full faith and credit conflicts could be litigant-based, state-based, or global solutions. A litigant-based solution would look to what would be the "fairest" outcome for the litigants. The problem with this approach, however, is that it is indeterminate. Most conflicts in preclusion law would pit the interests of one litigant against the interests of the other. Unless one has a higher-order rule, there is no way to break the deadlock.

State-based solutions are also indeterminate. Consider two possible rules: recognize all judgments according to the preclusion law of the state of rendition or recognize all judgments according to the preclusion law of the state of recognition. Looking only at full faith and credit values, as long as the state of recognition applies the preclusion rules of an interested state, full faith and credit values are satisfied.

A global solution would call for the development of national preclusion law to be applied in all judgment recognition cases. Although it is

62. See id. at 441.

63. As Justice Frankfurter put it:

The... question before us is how far the Full Faith and Credit Clause undercuts the purpose of the Constitution, made explicit by the Tenth Amendment, to leave the conduct of domestic affairs to the States. Few interests are of more dominant local concern than matters governing the administration of law. This vital interest of the States should not be sacrificed in the interest of a merely literal reading of the Full Faith and Credit Clause.


64. Such higher-order rules are possible, of course. For example, conflicts could be resolved in favor of the rule giving rise to the most preclusion or the least preclusion. It is not clear that there is a higher-order rule, however, that can be mined from an assessment of full faith and credit values.

65. See 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, 102 (1984). It should be noted that the choice need not be restricted to the preclusion laws of the state of rendition and state of recognition, but might also include the preclusion laws of the source of the substantive law under which the case had been decided. Cf. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 Cornell L. Rev. 733, 830 (1986) (preclusive effect of judgments generally determined by preclusion law of jurisdiction whose substantive law is being applied).

66. It would also be possible to develop preclusion law that would only apply to inter-
possible to define such national rules, their enforcement could be a formidable task. Even if they could be enforced, it is not clear that such rules would be desirable. Preclusion rules reflect a balancing of the benefits to be gained in permitting relitigation of the issue or claim against the costs to the judicial system of allowing relitigation. A global solution would make these decisions for all courts. Apart from the value of seeing how different preclusion rules function empirically, the imposition of a global solution encroaches on state prerogatives in a way that raises serious federalism concerns. Unless the imposition of uniform procedures is required by due process principles, the federal government should be reluctant to dictate the procedures state courts may use in adjudicating cases.

Thus, the best solution to the problem appears to be the development of second-order rules that select the preclusion law or constrain the choice of preclusion law to be applied by the court of recognition. The plain reading approach may be seen as such a rule—it directs that the court of recognition always apply the law of the state of rendition. The question is whether the plain reading approach is the second-order rule that best furthers preclusion law and full faith and credit values.

D. Due Process

The manner in which courts recognize prior judgments obviously affects the interests of the parties. Thus, preclusion law in general and interstate preclusion law in particular might implicate due process concerns. However, unlike the typical choice of law problem, in which the due process clause often functions in parallel with the full faith and credit clause, the due process clause plays a limited and distinctive role in the system cases. Such a solution would have all the problems of a global solution and so is not considered separately.


68. Cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a . . . State may . . . serve as a laboratory [for] novel social and economic experiments.").

69. This is not to suggest that such rules would be unconstitutional. Article IV would appear to offer ample authority to act in this way. However, the spirit of the Constitution should cause one to be hesitant to impose rules on the operation of state courts that would apply to all cases, particularly if such rules might have fiscal ramifications.

70. This question is addressed infra at text accompanying notes 141-143.

71. In the typical choice of law context, a choice of the substantive law of a state that lacks a significant relationship to the case would be unconstitutional. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-19 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981); see also Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930) (invalidating a choice of Texas law to construe Mexican insurance policy on due process grounds). For a discussion of the interrelationship of the two provisions, see Brilmayer,
intersystem preclusion problem.

Both procedural and substantive due process intrude on the intersystem preclusion problem. Under procedural due process, persons may not be deprived of life, liberty or property in an adjudication without reasonable notice of the action against them and an opportunity to be heard in the proceeding. In addition, the proceeding must utilize appropriate procedures. It follows, then, that a court may not give preclusive effect to a judgment that violates a party's due process rights. Due process can act as a constraint on that judgment's preclusive effect, even if the original judgment's validity may not be challenged. For example, the test for determining whether to permit the use of nonmutual offensive collateral estoppel includes an evaluation of the quality of the procedures employed by the first court.

The apparent power of the due process clause in preclusion situations has been limited, however, by notions of waiver and opportunity to litigate. Due process rights may be waived; parties who appear in an action but fail to raise possible due process objections are deemed to have waived their due process rights. As a result, a prior judgment that might otherwise have been refused recognition on due process grounds will be recognized if parties are found to have waived their rights. Similarly, once a due process claim has been litigated, preclusive effect is given to the issue decided. Thus, a determination in the first proceeding that due process had been afforded a party must be accepted as true in subsequent proceedings in which preclusive effect is sought, even if that original determination is erroneous.

This leaves a rather limited role for procedural due process in the preclusion context. At present, the case law limits its application to two


74. See id. at 90-93. Most of the case law on the adequacy of procedures has focussed on non-judicial proceedings. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 323-26 (1976) (Social Security Administration administrative review of disability benefit eligibility); Goldberg v. Kelly, 397 U.S. 254, 255-60 (1970) (New York City Department of Social Services terminating public assistance without evidentiary hearing). Most judicial proceedings would conform to due process minima. Nonetheless, the Supreme Court has discussed the possibility that a prior judgment need not be given preclusive effect because of procedural due process defects. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (procedures employed by first forum a factor to be considered when determining whether to give preclusive effect to issue determined by forum in offensive nonmutual collateral estoppel situation).
75. See Wuchter v. Pizzutti, 276 U.S. 13 (1928).
76. See Parklane Hosiery, 439 U.S. at 331.
79. See Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).
situations: cases in which due process claims involving the first proceeding cannot be said to have been litigated or waived, most notably attacks at default judgments for lack of proper notice; and situations in which the quality of the procedures employed in the prior proceeding can be considered as a discretionary factor in determining the preclusive effect of that judgment. 

Substantive due process also plays a limited role in interstate preclusion. The prototypical substantive due process claim in the preclusion context is one that claims that the court acted without personal or subject matter jurisdiction, or that the court applied an improper choice of substantive law. Once again, although all of these issues can be raised within the context of the original proceeding, litigation of these issues, or even their appearance in the original action, precludes their consideration in a subsequent suit. Thus, it would appear that only default judgments are vulnerable to attack on substantive due process grounds.

A different type of due process claim is implicated in the preclusion context. This claim treats the prior judgment as a property interest that has vested in the judgment holder and imposes constraints and obligations on a court asked to recognize this property interest. The logic of the claim is that once a final judgment has been rendered, failure to recognize the judgment amounts to a deprivation of a property interest without due process of law.

Analysis of this claim leads to two questions, depending on the context. In the intrastate context, the relevant question is whether the court has a rational basis for recognizing (or failing to recognize) the prior judgment. So, for example, imposing a time limit for actions to enforce a judgment has a rational basis, even though it might have the effect of not giving preclusive effect to a prior judgment.

80. See Restatement (Second) of Conflict of Laws § 104 (1971).


82. These are substantive due process claims in that the parties have been afforded notice and an opportunity to be heard, but are contending that the court's actions, themselves, are unconstitutional.


84. But see Kalb v. Feuerstein, 308 U.S. 433, 438-40 (1940) (collateral attack of final state court judgment permitted in federal court because federal bankruptcy laws create an exception to normal operation of full faith and credit statute). Kalb shows that, in appropriate situations, the usual laws of preclusion will give way to important substantive policies of the court of recognition.

85. This is, for the most part, a substantive due process claim. As long as the judgment holder is afforded an opportunity to seek recognition of the judgment in a proceeding with adequate procedures, a procedural due process claim would fail. The only possible procedural due process objection is that a prevailing party should enjoy the right to not have to relitigate a matter already litigated. Such a due process right to avoid process is somewhat akin to the double jeopardy clause, U.S. Const. amend. V, which has been limited by the Supreme Court to a narrow range within the criminal law context. See generally Green v. United States, 355 U.S. 184, 187-88 (1957) (discussing scope of double jeopardy clause).
In the interstate context, in addition to justifying preclusion itself, the
court must justify its choice of preclusion rule. Under due process analy-
sis, however, the choice of preclusion law is easily justifiable, as long as
the law chosen bears some relation to the controversy.\textsuperscript{86} Either the pre-
clusion law of the state rendering the first judgment or the preclusion law
of the forum would appear to satisfy this test.\textsuperscript{87} So, if a state applied its
own statute of limitations to an action to enforce a judgment, or if it
applied the statute of limitations of the state that rendered the judgment,
no due process right in the prior judgment would be upset.

Thus, although a judgment holder would appear to have a vested right
in the judgment, that right is not as powerful as it might first appear.
The right that vests is only to require the court of recognition to treat the
prior judgment in a rational manner. The limited nature of this right can
be shown by returning to the accident example mentioned earlier;\textsuperscript{88} a
person involved in an accident institutes one action in negligence for
damage to her motorcycle and another for her personal injuries. The
property action reaches judgment first and the plaintiff is awarded dam-
ages. In the personal injury action, both parties seek to exercise the
"right" that has vested in the property action. The plaintiff asserts that,
because the issue of the defendant's negligence has been decided in the
earlier suit, the defendant is precluded from relitigating the issue in the
personal injury suit. The defendant asserts that, because the personal
injuries arose from the same event as did the property damage, the per-
sonal injury claim has merged into the prior judgment and, because the
plaintiff did not raise the claim in the prior suit, she is precluded from
litigating the claim in the second suit.

However a particular jurisdiction resolves the competing preclusion
claims, it is clear that it does so not under a theory of vested rights, but
based on its evaluation of preclusion law principles. As a result, it is false
to say that judgments create rights that vest in favor of litigants. Rather,
courts recognize judgments to serve judicial goals that often, but not in-
variably, correspond to the interests of the "rights" holder.

A more sophisticated variant of the vested rights claim is that the
rights vested in a judgment include the use of preclusion law of the court

\textsuperscript{86} See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-07 (1985); Allstate Ins.
Co. v. Hague, 449 U.S. 302, 308 (1981); Alaska Packers Ass'n v. Industrial Accident

\textsuperscript{87} If preclusion law is deemed to be part of the "procedural" law of the forum, see
Restatement (Second) of Judgments 5-13 (1982), the forum may employ its own preclu-
sion law, at least with regard to the due process clause, in matters of recognizing judg-
ments. See, e.g., Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (state may apply its
own statute of limitations to action even if it applies the substantive law of another state
because the statute of limitations is procedural); McElmoyle v. Cohen, 38 U.S. (13 Pet.)
312 (1839) (forum may apply its own statute of limitations governing enforcement of a
judgment). Even if preclusion law is considered "substantive," the forum would proba-
bly have a sufficient interest in the action to justify, at least in due process terms, the
application of its own preclusion law.

\textsuperscript{88} See supra notes 50-55 and accompanying text.
that rendered the judgment. This view fails to comport with preclusion law practice and is analytically indefensible. If the claim were true, several aspects of interstate preclusion doctrine, such as the workers' compensation cases, recognition of equity decrees and recognition in domestic relations cases, would be constitutionally defective. In all of these situations, the court asked to recognize the prior judgment does so using its own preclusion law.

Analytically, it is difficult to see why the procedural law of the court of rendition should be applied in future litigation in some other forum. The forum's procedural law is in no way tied to the substantive right sought to be adjudicated, but is only applied by the forum because the forum deems those procedures to be proper and fair. If the forum in which recognition is sought has different rules which it deems to be proper and fair, why shouldn't it be able to apply them, as long as the rules satisfy due process? Once again, the claim assumes what it has to prove—that a "right" to a particular regime of preclusion law exists and that a state cannot apply a different one without violating the due process clause.

E. Summary

Because intersystem preclusion involves two issues—the application of rules of preclusion to a prior judgment and the choice of preclusion law—subject to due process constraints, intersystem preclusion is an intricate and somewhat convoluted area of law. Having identified the various concerns at stake, the Article turns to a consideration of the plain reading approach in light of these concerns.

II. THE PLAIN READING APPROACH TO INTERSYSTEM PRECLUSION

The preceding section of the Article has shown that a consideration of preclusion and full faith and credit values does not unambiguously indicate whether a particular state's preclusion law should be used. Nonetheless, it is clear that some choice of law rules are needed to foster uniformity and to allocate the power of adjudication among the states sensibly.

In assessing the plain reading rule as a choice of law rule, this section first confronts the argument that application of the plain reading rule is required by either the full faith and credit clause or the full faith and credit statute. If either of these claims were true, courts would be bound to apply the plain reading rule even if other choice of law rules addressed full faith and credit and preclusion law values more coherently. The Article next considers the merits of the plain reading approach as a co-
herent way to address and accommodate full faith and credit and preclusion law values.

A. Interpretation of the Full Faith and Credit Clause and Statute

The plain reading approach is, in choice of law terms, a rule that requires the court of recognition to apply the preclusion law of the state in which judgment was rendered. It is called the plain reading approach because it is alleged to be compelled by the plain language of the full faith and credit clause and statute.\(^3\) This approach to the statute would be defensible, even if it sometimes produces less than optimal results, if it could be shown that it was dictated either by the full faith and credit clause, the framers' understanding of the clause, or the legislative history of the full faith and credit statute.\(^4\) An examination of these materials suggests that, to the extent the framers had an understanding of what the full faith and credit clause and statute were trying to accomplish, the purpose of the provisions was considerably less ambitious than the plain reading approach, as applied, suggests. Indeed, as other commentators have concluded, "history provides no aid to interpretation except perhaps to make clear that the words of the implementing statute should not be given their literal effect."

\(^{93}\) See, e.g., Kremer v. Chemical Constr. Corp., 456 U.S. 461, 467 (1982) ("By its terms, therefore, [section] 1738 would appear to preclude . . . relitigating the same question in federal court" that had already been decided in state court); Allen v. McCurry, 449 U.S. 90, 96 (1980) (full faith and credit statute "specifically require[s] all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so").

\(^{94}\) The process of statutory and constitutional interpretation is itself a matter of controversy. Some advocate adherence to only the plain meaning of texts and would not examine other possible sources of meaning. This view has assumed new prominence in the opinions of Justice Scalia. See, e.g., Green v. Bock Laundry Machine Co., 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring) ("I would not permit any of the historical and legislative material . . . to lead me to a result different from [the plain reading]"). This Article will not attempt to address this claim fully except to note that Justice Scalia, in Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), did not use the plain reading approach in interpreting the full faith and credit clause. In Sun Oil, Justice Scalia interprets the clause by referring to existing international law at the time of its adoption, comments of the framers and the history of practice in the area. See id. at 722-26. Interestingly, Justice Scalia makes no mention of the full faith and credit statute and its possible import in the question of whether a state court is required to apply the statute of limitations of the state whose law creates the cause of action.

Chief Judge Wald has expressed views on statutory interpretation that both describe the process of interpretation and prescribe the proper method:

No occasion for statutory construction now exists when the Court will not look at the legislative history. When the plain reading rhetoric is invoked, it becomes a device not for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say.


\(^{95}\) Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 155 (1949).
1. The Framers’ Intent

Surprisingly little is known of the framers’ intentions in adopting the full faith and credit clause. What little evidence there is tends to support the view that the clause was intended to be a rule of evidence, requiring sister states to give full evidentiary value to proof proffered of the laws and judgments of other states. An evidentiary approach would presumably leave most of the choice of law issues to the court of recognition. For example, issues of judgment quality, including the existence of jurisdiction in the rendering court, would be determined by the court of recognition. Similarly, certain issues of effect, such as mutuality and privity of parties, would be decided by preclusion law principles of the court of recognition. Of course, even the evidentiary approach would have a substantial effect on the court of recognition’s assessment of the content of the prior judgment and on preclusive effect, to the extent that the judgment is recognized at all. This would be true even when the prior judgment entailed matters of concern to the court of recognition.

Recognition of foreign judgments had been a problematic area in both British and colonial courts. Several colonies entered into treaties providing for mutual recognition of judgments and others enacted statutes providing for the recognition of colonial judgments.


97. See Whitten, supra note 96, at 31-39. Whitten reaches his conclusion, however, largely from an assumption that “full faith and credit,” as used in the Constitution, would take on the same meaning as it had in the Articles of Confederation and in English and Colonial practice. See id. at 31. Looking only at the sparse record of proceeding of the framers, it is difficult to reach any definitive conclusion. Interestingly, Madison, in The Federalist No. 42, viewed the constitutional language as “extremely indeterminate,” although he believed the clause to be “an evident and valuable improvement on the clause relating to this subject in the articles of Confederation” because of the power granted to Congress to specify the manner of proof and the effect of prior judgments. See The Federalist, No. 42, at 308 (J. Madison) (B. Wright ed. 1961).

98. For example, if a state court had construed a contract between citizens of different states according to forum law, the court of recognition could not reinterpret the contract under its own laws. Assuming that the prior judgment was of a sufficient quality to be recognized and that it should have an effect on the parties, the court of rendition’s factual findings and interpretation of the contract would become conclusive evidence bearing on the meaning and validity of the contract.

99. The English practice of the time is discussed in Whitten, supra note 96, at 12-19.

100. See id. at 19-24. Most of the colonies dealt with the problem using evidentiary
ing that the Articles of Confederation contained a full faith and credit provision.\textsuperscript{101}

Little is known of the intent of the drafters of the Articles.\textsuperscript{102} Apparently, although the language adopted met with little resistance,\textsuperscript{103} a motion to create an action of debt enforceable in all states based on the existence of a judgment from any state was defeated.\textsuperscript{104} Commentators disagree on the importance of the motion's defeat.\textsuperscript{105} Moreover, the five reported cases construing the full faith and credit provision of the Articles of Confederation also do not provide much guidance in determining the meaning of the clause.\textsuperscript{106}

The actions of the framers of the Constitution should be seen against this background. The limited references to discussions by the framers concerning the full faith and credit clause tend to confirm that the clause was not intended to break new ground.\textsuperscript{107} The mere existence of the clause, however, has caused some to view it as intending to place sister state judgments on a higher plane than other foreign judgments.\textsuperscript{108} This theory assumes that, in the absence of any clause, sister state judgments would be recognized at least to the same extent as judgments of foreign nations.\textsuperscript{109} Thus, there would have been no reason to enact a full faith and credit clause unless it was intended to go beyond principles of international law.\textsuperscript{110}

\begin{itemize}
\item \textsuperscript{101} See id. at 24.
\item \textsuperscript{102} See Nadelmann, supra note 96, at 35; Whitten, supra note 96, at 24-27.
\item \textsuperscript{103} See Sumner, supra note 96, at 229-30.
\item \textsuperscript{104} See Nadelmann, supra note 96, at 36.
\item \textsuperscript{105} Professor Radin attributes its defeat to technical aspects of the provision dealing with bonding requirements. See Radin, supra note 96, at 6. Professor Whitten argues that the defeat of the motion lends additional support for his view that full faith and credit was intended to be an evidentiary concept. See Whitten, supra note 96, at 28.
\item \textsuperscript{106} The cases are: Kibbe v. Kibbe, Kirby 119 (Conn. 1786); Phelps v. Holker, 1 Dall. 261 (Pa. 1788); Miller v. Hall, 1 Dall. 229 (Pa. 1788); James v. Allen, 1 Dall. 188 (Pa. 1786); Jenkins v. Putnam, 1 S.C.L. 3, 1 Bay 8 (1784). Compare Sumner, supra note 96, at 230 (“In each of these cases it was held that the clause was nothing more than a rule of evidence.”) and Whitten, supra note 96, at 29 (“none of the cases are inconsistent with [the evidentiary] interpretation”) with Nadelmann, supra note 96, at 53 (“These few decisions are insufficient to support any specific construction of the Full Faith and Credit clause in the Articles.”).
\item \textsuperscript{107} See Radin, supra note 96, at 7; Reese & Johnson, supra note 95, at 154-55; Sumner, supra note 96, at 235.
\item \textsuperscript{108} See, e.g., Atwood, supra note 6, at 66 (“it is apparent that the clause was included in the Constitution to further the sense of federation among the states”).
\item \textsuperscript{109} See, e.g., Hilton v. Guyot, 159 U.S. 113 (1895). In fact, there would be little difference in result if sister states would recognize each other's judgments as a matter of comity. See infra note 110. There could, however, be a lack of uniformity in approach to judgment recognition and more potential for abuse. See infra note 111.
\item \textsuperscript{110} The Restatement (Second) of Conflict of Laws § 98 comment b (1971) states: “Judgments rendered in a foreign nation are not entitled to the protection of full faith and
This is a powerful argument, but one that assumes too much about the aims of the framers. The Constitution was not entirely a document of revision, setting forth changes from the existing legal framework; instead, it was in large part a constructive document, setting forth a new structure of government. It was logical, especially considering the existence of similar provisions in the Articles of Confederation, that provisions for judgment recognition were spelled out in the Constitution. Similarly, it is widely believed that other provisions of the Constitution were added for clarity, not to alter the law.

Given the paucity of evidence of intent and the opaqueness of the text, it is not surprising that most adherents of the plain reading approach rely on the full faith and credit statute for support.

2. The Full Faith and Credit Statute

One notable change from the Articles of Confederation language is the provision in the Constitution empowering Congress to develop statutes to specify the manner in which judgments and laws are to be proved and the credit. In most respects, however, such judgments ... will be accorded the same degree of recognition to which sister State judgments are entitled."

111. Indeed, one can imagine the argument that, if the full faith and credit clause had not been included in the Constitution, the omission would be seen as a rejection of the obligation to recognize sister state judgments.

Another possible justification for the clause is that it provided for federal supervision. This justification is obviously implicated by the provision empowering Congress to develop standards encompassing the manner of proof and effect of sister state judgments. But even if Congress had failed to so act, the clause would give rise to subject matter jurisdiction in at least the Supreme Court in cases presenting interstate preclusion law issues. Thus, even if no change from international law was intended, the clause was essential in order to give the federal courts the power to police the actions of the states under the standards of international law. In the absence of a full faith and credit clause, the failure of one state to recognize the judgment of another state would appear to raise no federal question.

112. The Bill of Rights is a good example. Some opposed adoption of such provisions because they might be construed to limit the enforcement and recognition of individual rights. See 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 436 (2d ed. 1836) ("an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.") (remarks of James Wilson); The Federalist No. 84 at 535 (A. Hamilton) (B. Wright ed. 1961) (The Bill of Rights "would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."). See generally, Caplan, The History and Meaning of the Ninth Amendment, 69 Va. L. Rev. 223, 238-59 (1983) (discussing debates over ratification of Bill of Rights and ninth amendment). As the ninth amendment makes clear, however, the Bill of Rights was intended as a partial enumeration of particular rights. See 1 Annals of Cong. 456 (1789) (statement of James Madison) (defending Bill of Rights against this objection by pointing to existence of what is now ninth amendment). Whether or not it is prudent for judges to enforce rights not specifically enumerated in the constitution against state or federal action, it seems clear as an analytical matter that the ninth amendment must be read as envisioning the existence of rights not specifically enumerated in the constitution.

113. See Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484-85 (1813) (Story, J.); see also supra note 103.
effect of such judgments and laws in the state of recognition. Pursuant to this power, the first Congress passed the full faith and credit statute.\textsuperscript{114} In its initial formulation, the statute provided, in pertinent part, that "records and judicial proceedings, [properly] authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are or shall be taken."\textsuperscript{115} Early courts construed the statute as being concerned only with evidence, and not as a directive to apply the preclusion law of the state of rendition in determining the effect of the prior judgment.\textsuperscript{116} In \textit{Mills v. Duryee},\textsuperscript{117} however, the Supreme Court rejected the evidentiary interpretation of the full faith and credit statute.\textsuperscript{118} In his opinion for the Court, Justice Story reached his conclusion by taking a plain reading of the statute and contending that the evidentiary approach would render the full faith and credit clause illusory, as evidentiary recognition would have been accorded foreign judgments under the common law.\textsuperscript{119} Story did not consider any of the policies underlying full faith and credit nor did he consider legislative intent.\textsuperscript{120}

Story's interpretation of the full faith and credit statute is a plausible interpretation and, but for subsequent doctrinal developments, might be entirely defensible. Adherents of the plain reading approach must confront two inconsistencies with the approach: first, the inconsistency in treatment between faith and credit to judgments and faith and credit to laws; and second, the fact that the plain reading approach is not followed by the Supreme Court in particular situations. Because these inconsistencies cannot be explained by reference to a plain reading of the full faith and credit statute, adherents of the plain reading approach are...
forced to defend their views on policy grounds. When viewed on policy grounds, however, the plain reading approach is an unattractive solution to interstate preclusion problems.

3. Consistency in Treatment Between Full Faith and Credit to Laws and to Judgments

Although there are parallel references to laws and judgments of sister states in the constitutional provisions, full faith and credit to laws was not thought to be enforceable throughout much of our constitutional history. Much of the choice of law problem was thought to be a matter of "general common law" under the doctrine of *Swift v. Tyson*, and was not conceived of as a full faith and credit matter. Indeed, some scholars thought that the full faith and credit clause was not self-executing; unless Congress executed its power to determine the effect of the laws of sister states, the full faith and credit clause imposed no restraints on the actions of states. This view was shattered in the 1930s when the

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121. There was no clause dealing with the faith and credit to be given to laws in the Articles of Confederation.

122. As Professor Brilmayer has stated, "The parallel treatment of judgments and legislative acts is evident. Yet virtually the entire effect of the clause and its implementing statute has occurred in the context of interstate enforcement of judicial decisions. The impact on the disregard of other states' laws has been minimal." Brilmayer, supra note 65, at 95.


124. The doctrine of *Swift v. Tyson* provided that courts were free to decide questions of "general law" through the use of universal principles of law and were not bound to follow the common-law precedents of any particular jurisdiction. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), Justice Brandeis criticized *Swift* as resting on the unfounded assumption that there was "'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" *Erie*, 304 U.S. at 79 (quoting Justice Holmes).

The *Swift* doctrine had two effects on the choice of law problem. First, choice of law was largely irrelevant in the context of common-law actions because the court deciding the question was not limited to the precedents of any one jurisdiction. For example, the lower courts in the *Erie* case did not determine the railroad's duty of care to Tompkins by reference to the tort law of any particular jurisdiction, but decided the issue on the basis of "general law." *Erie*, 304 U.S. at 74-80.

Second, in those situations in which choice of law analysis was performed, choice of law was itself considered to be a common-law area, subject to the *Swift* general common-law principles. *See*, e.g., *Stewart v. Baltimore & O.R.R.*, 168 U.S. 445, 450 (1897) (choice of law determination of applicability of wrongful death statute); *Northern Pac. R.R. v. Babcock*, 154 U.S. 190, 196-99 (1894) (choice of law determination of wrongful death recovery limits); *Dennick v. Railroad Co.*, 103 U.S. 11, 21 (1880) (choice of law determination on scope of wrongful death statute).

125. *See*, e.g., *Nadelmann*, supra note 96, at 73 ("For about a century after the making of the Constitution, the general view was that, for 'public acts,' the command in the Full Faith and Credit clause was not self-executing."); *Langmaid, The Full Faith and Credit Required for Public Acts*, 24 Ill. L. Rev. 383, 387-388 (1929) (same). Although the full faith and credit clause had little effect on choice of law during this period, the due process clause was available to correct at least some choice of law decisions. *See*, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-10 (1930) (choice of Texas law to interpret contract between Mexican citizens entered into in Mexico and to be performed in Mexico violates
Supreme Court began to use the full faith and credit clause, or at least consider its possible use, to invalidate choice of law decisions made by states that might have paid short shrift to the laws of sister states.126

The doctrine developed by these cases stood in sharp contrast to then-prevailing choice of law doctrine, which emphasized bright-line rules for selecting the applicable law.127 Rather than using the clause to impose a view as to the proper choice of law methodology, the Court viewed full faith and credit as setting an outer boundary that constrained a state’s choice of law. A state thus gave full faith and credit to the laws of sister states, even when it declined to enforce the sister state’s law, as long as it applied the law of an interested state, most often the law of the forum.128

Before 1948, a rational argument could be made to justify this difference in approach between faith and credit to laws and faith and credit to judgments, based on the fact that the full faith and credit statute covered only judgments. Under this argument, the Constitution only required sister states to take due regard of sister states’ laws and judgments, but did not require deferral to foreign laws and judgments in cases where the sister state’s law or judgment arguably should apply.129 The full faith and credit statute, however, went beyond this constitutional minimum to require deference to the interest of the state of rendition. Because the statute only encompassed faith and credit to judgments, the lack of parallel treatment was rational.

This argument became harder to make, however, following the 1948

the due process clause). The full faith and credit clause was used to invalidate a choice of law in Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932). It has thus been clear since at least 1932 that the full faith and credit clause imposed some restrictions on a forum’s choice of law decision. Under the current standard, a state may choose the law of any state that has “‘a significant contact or significant aggregation of contacts, creating state interests, such that [the] choice of its law is neither arbitrary nor fundamentally unfair.’” Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981)). Many scholars believe, however, that the Court has not gone far enough in regulating choice of law. See R. Cramton, D. Currie & H. Kay, Conflict of Laws 415 (4th ed. 1987) (“conflicts scholars have made a cottage industry of criticizing the plurality opinion in Hague”).

126. See, e.g., Pacific Employers Ins. Co. v. Industrial Accident Comm’n, 306 U.S. 493, 502-03 (1939) (full faith and credit clause does not preclude state from applying its workers’ compensation statute when the worker was injured in the state); Alaska Packers Ass’n v. Industrial Accident Comm’n, 294 U.S. 532, 544-50 (1935) (full faith and credit clause does preclude state from applying its workers’ compensation statute when the employment relationship was formed in the state); Bradford Elec. Light, 286 U.S. at 154-55 (full faith and credit clause requires application of the workers’ compensation statute of the state in which the employment relationship was formed).

127. This approach, sometimes termed a “vested rights” approach, is reflected in the approaches taken in the Restatement of Conflict of Laws (1934) by its reporter, Joseph Beale.

128. See supra note 125.

129. See Nadlemann, supra note 96, at 79-81.

130. Cf. Thomas v. Washington Gas Light Co., 448 U.S. 261, 273 n.18 (1980) (“Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State . . . .”).
amendment to the full faith and credit statute. The 1948 version of the statute carries forward the parallel treatment of laws and judgments contained in the full faith and credit clause and appears to require the court of recognition to defer in both situations. Thus, adherents of the plain reading approach must justify why the same language in the clause and the statute has different meanings depending on whether recognition is sought of another state's law or another state's judgment.

The response to the 1948 changes has taken three forms. One approach, often followed by the Supreme Court, is not to acknowledge the changes at all. The post-1948 cases involving full faith and credit challenges to choice of law decisions have, for the most part, continued to rely on pre-1948 opinions construing the full faith and credit clause, with nary a mention of the full faith and credit statute.

The second approach is to rely on the fact that the legislative history of the 1948 amendments appears to view the changes to the full faith and credit statute as being "technical" or "grammatical," and gives no hint that any change in substance was intended.

131. The present version of the statute is unchanged from the 1948 version.


In Carroll v. Lanza, 349 U.S. 408 (1955), an employee residing in Missouri was injured in Arkansas while in the course of employment for a Missouri employer. The Missouri Compensation Act specified that unless the employer or the employee filed a written waiver prior to the occurrence of an accident, the parties would be "'conclusively presumed to have elected to accept' its provisions," that provides that the Act constitutes the exclusive remedy for injuries. See id. at 409 (quoting Mo. Rev. Stat. § 287.060 (1949)). The Act applied to injuries received outside the state if the employment contract was made, as it was in Carroll, in Missouri. See id. Even though no written waiver was filed prior to the accident and even though Carroll was receiving weekly payments under the Missouri Act, Carroll sued Lanza in an Arkansas court for common-law damages. See id. at 410. The majority opinion, in sustaining a judgment in favor of Carroll based on Arkansas law, followed the general pattern of disregarding the full faith and credit statute, despite Justice Frankfurter's invocation of the statute in his dissent:

Furthermore, the new provision of 28 U.S.C. § 1738 cannot be disregarded. In 1948 Congress for the first time dealt with the full faith and credit effect to be given statutes. The absence of such a provision was used by Mr. Justice Stone to buttress the Court's opinions both in Alaska Packers, 294 U.S., at 547, and Pacific Employers, 306 U.S., at 502. Hence, if § 1738 has any effect, it would seem to tend toward respecting Missouri's legislation. Id. at 422 (Frankfurter, J., dissenting) (footnote omitted).

In Hughes v. Fetter, 341 U.S. 609 (1951), the Court recognized the 1948 revision to 28 U.S.C. § 1738 but "found it unnecessary to rely on any changes accomplished by the Judicial Code revision." Id. at 613 n.16. The apparent pattern of disregarding the full faith and credit statute has prompted the following questions in a prominent casebook on the conflict of laws: "Is it surprising that this statute has not figured prominently in the [Court's] decisions? Does it mean anything at all?" R. Cramton, D. Currie & H. Kay, supra note 125, at 410.

133. The revisers' notes suggests that the words "such acts" were included in the revised statute in order to "follow[] the language of Article IV, section 1 of the Constitu-
changes in the statute were "inadvertent" and should be ignored. Although there is precedent for ignoring the plain language of statutes, ordinarily the reason for it is not that the language was not intended, but because the court believes that the language is so irrational that it is necessary to look to alternative indications of legislative intent. In any event, it is difficult to reconcile a policy-oriented reading of the statute in the choice of law area with a plain language approach in the judgment recognition area.

The third justification for ignoring the statute specifically considers the policies underlying full faith and credit. Proponents of this view argue that deferring to the law of a sister state is irrational and perverse. It is irrational because it does not sensibly address the policies of full faith and credit. It is perverse because, in the identical case brought in two different state courts, each court might be forced to apply the law of the
other state.\textsuperscript{138}

An implication of this third approach to the interpretation of the full faith and credit statute is that it is sensible to take a plain reading of the full faith and credit statute in the judgments context.\textsuperscript{139} In order to explore this assumption, we must identify the values of full faith and credit and determine how well these values are served by a plain reading of the full faith and credit statute.\textsuperscript{140}

B. The Plain Reading Approach, Preclusion Values and Full Faith and Credit Values

From a policy perspective, the plain reading rule might best be seen as a rule that is easy to identify and apply and one which often produces sensible results. The doctrine promotes consistent results across cases and across states. However, it does not always sensibly divide power between the state of rendition and the state of recognition, nor does it always produce results that best advance preclusion law values.

Whenever adhering to the preclusion law of the state of rendition would encourage litigants to raise claims and issues in a way that encourages efficiency and finality, the plain reading rule facilitates preclusion law values. In addition, if adhering to the preclusion law of the state of rendition furthers that state's substantive interests, the plain reading approach represents a sensible accommodation of competing state interests. Many, if not most, situations fall under either or both of these categories. For example, if State X were to adjudicate a contract action between a

\textsuperscript{138} See Sterk, \textit{supra} note 136, at 1340:

The most literal analysis would require that the forum apply the sister state's statute in any case where, on the same facts, the sister state would deem the statute applicable. Whatever the theoretical plausibility of such a rule, however, its practical result would be nonsensical . . . . Not only would such a rule frustrate the interests of each state, but perhaps more importantly, the rule would do nothing to advance the policy of national unification that underlies the full faith and credit clause. Such a rule, of course, has never warranted serious consideration.

\textsuperscript{139} See Sterk, \textit{supra} note 136, at 1344-45. Of course, even if one can find reasons for interpreting full faith and credit to impose greater requirements on courts of recognition in the judgments context than in the choice of law context, it does not follow that the full faith and credit statute should be read literally. As Professor Brilmayer has pointed out:

The greater deference due judgments can be found in a surprising variety of contexts.

. . . . It is sometimes said that the full faith and credit clause places the Constitution behind the policies of res judicata and collateral estoppel. But this surely does not mean that states are obliged to adhere to traditional res judicata rules without exception.

Brilmayer, \textit{supra} note 65, at 99-100.

party from State X and a party from State Y, State Y should not be allowed to relitigate matters decided in the State X action, because to do so would be to frustrate State X's legitimate interest in applying its law to the contract.

On the other hand, there may be situations in which full faith and credit values are better served by the imposition of a federal standard, such as in the case of allegations of jurisdic- tional defects in the court of rendition, or where the application of the plain reading approach would frustrate the substantive interests of the state of recognition without advancing a substantive interest of the state of rendition, or where adherence to the preclusion law of the state of rendition would not advance any preclusion law policies of that court. In those situations, the plain reading approach does not result in a sensible distribution of power between the affected states.

The plain reading approach would be totally unobjectionable if it were conceived of as a presumption that, unless factors argue in favor of another choice of law, a court of recognition will apply the preclusion law of the state of rendition. Alternatively, if it were conceived of as an approximation of the rules—a rule of thumb which generally produces the same results as a carefully reasoned approach—there would be nothing objectionable about it. The problem results from considering the plain reading to be an iron-clad rule for interstate preclusion. This view can and does lead to situations in which the preclusion law of the state of rendition is applied even though doing so frustrates the interests of the state of recognition without serving any pertinent interest of the state of rendition.

Moreover, the argument that the price the federal system might pay in terms of frustrated interests are offset by ease in identification and application of the plain reading approach is undercut by the existence of many exceptions to the plain reading approach. The next section of the Article catalogs and critically discusses the plain reading approach and its various exceptions.

IV. A CANVASSING OF SUPREME COURT DOCTRINE

As mentioned earlier, the Supreme Court cases in this area are typified by a general rule that requires the application of the preclusion law of the state of rendition, but also includes discrete situations in which different rules are applied. After describing the state of the case law, the Article will suggest another approach to interstate preclusion that conforms to the outcome of most of the cases.

141. See infra notes 243-252 and accompanying text.
142. See infra notes 267-273 and accompanying text; see also infra notes 144-159 and accompanying text.
143. See infra notes 274-283 and accompanying text; see also infra notes 232-242 and accompanying text.
A. The Plain Reading Approach

The plain reading approach to interstate preclusion problems requires the court of recognition to treat a prior judgment in precisely the same way as would the rendering court. The operation of this approach, as well as some of the problems it raises, are illustrated by the Supreme Court’s decision in *Fauntleroy v. Lum.*

In *Fauntleroy*, Lum and Searles, two Mississippi citizens, entered into a contract involving cotton futures in Mississippi, to be performed in Mississippi. After a dispute arose under the contract, the parties agreed to arbitration. The arbitrators found in favor of Searles, but Lum declined to pay. Searles then sought to enforce the award in a Mississippi court, but dismissed the action after he discovered that such contracts were unenforceable in Mississippi and could also subject the participants to criminal liability.

Searles then sought enforcement of the arbitration award in Missouri. Personal jurisdiction was obtained by serving Lum while he was passing through Missouri. Other than this transient jurisdiction over Lum, Missouri had no other connection with the lawsuit. The Missouri court refused to consider Lum’s argument that the contract was void under Mississippi law and upheld the arbitral award.

*Fauntleroy* then sought enforcement of the Missouri judgment in Mississippi. The Mississippi Supreme Court refused to give effect to the Missouri judgment because, in its view, the obligation was based on an illegal transaction. The United States Supreme Court reversed.

To Justice Holmes, the result was dictated by the plain language of the full

144. 210 U.S. 230 (1908). *Fauntleroy* is often used in casebooks to illustrate the plain reading approach. See, e.g., R. Cramton, D. Currie & H. Kay, supra note 125 at 588; A. Lowenfeld, Conflict of Laws 631 (1986); J. Martin, Conflict of Laws 372 (2d ed. 1984).
145. Searles had agreed to guarantee a line of credit issued to Lum by Searles’ brother, a cotton dealer. See Searles v. Lum, 89 Mo. App. 235, 238 (1901). Apparently, Searles’ brother and Lum then engaged in cotton futures transactions, resulting in an indebtedness of $596. See id. Searles satisfied the debt and sought reimbursement from Lum. See id.
146. See *Fauntleroy*, 210 U.S. at 233.
147. See id. at 238.
149. See *Fauntleroy v.* Lum, 210 U.S. 230, 238 (1908) (White, J., dissenting).
150. See id. at 238-39.
151. See id. at 239. The Missouri trial court excluded evidence tending to show that the indebtedness grew out of illegal transactions. See Searles v. Lum, 89 Mo. App. at 239. Lum’s theory was that, because the futures contracts were illegal, he had no obligation to pay debts incurred as a result of those contractual obligations, at least in situations in which the guarantor was aware of the actions subject to the guarantee. See id. The appellate court rejected Lum’s theory, reasoning that loans made to satisfy debts incurred by prohibited activities are distinct from the prohibited activities and are enforceable obligations even if the underlying debts are unenforceable. See id.
152. Searles assigned his interest in the judgment to his attorney, Fauntleroy. See *Fauntleroy*, 210 U.S. at 234.
153. See id.
154. See id.
faith and credit statute.\textsuperscript{155} Although he acknowledged that the holding would lead to the enforcement of judgments based on mistaken interpretations of foreign law, Holmes baldly asserted that “[m]istakes will be rare,” and that if the Missouri court erred, it had made a “natural mistake.”\textsuperscript{156}

The outcome in \textit{Fauntleroy} seems to address satisfactorily some full faith and credit values—uniformity in preclusive effect across states, certainty of result and avoidance of discrimination against out of state judgments. By not allowing reconsideration of the merits of the underlying claim, the Missouri judgment is treated the same in Mississippi as it would be in Missouri. Similarly, if collateral attack had been allowed, it would not have been on a “neutral” theory regarding collateral attack. The Mississippi court would have been allowed to reexamine the legality of the futures contract, not because of notions of mutuality of parties, privity or any other concept derived from Mississippi’s tradeoffs of preclusive and adjudicatory values, but because Mississippi did not like the result reached in the case.

Mississippi’s posture towards the Missouri judgment stands on better footing, however, when one conceives of the full faith and credit clause and statute as reflecting a balancing of sovereign interests. Under this view, a state may adopt whatever preclusion posture it wishes as long as it does not intrude on the sovereign interests of another state. In situations of apparent conflict, a federal rule must be imposed to produce an appropriate uniform solution. When one applies the typical federal rule used to address choice of law problems to the question of choice of preclusion law, Mississippi’s actions seem appropriate.

In the typical choice of law problem, the Court has adopted a “false conflict” model.\textsuperscript{157} Under this approach, a state faced with a choice of law problem must apply the law of a state which bears some relationship to the controversy and may apply its own law to the case, even if another state also has sufficient contacts with the case to justify the application of its own law. Although some commentators have been generally unsatis-

\textsuperscript{155} See \textit{id.} at 236. Actually, Holmes quotes Chief Justice Marshall’s statement in \textit{Hampton v. McConnel}, 16 U.S. (3 Wheat.) 232, 234 (1818), which states that:

the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States.

\textit{Fauntleroy}, 210 U.S. at 236. Chief Justice Marshall’s statement, of course, is little more than a restatement of the plain reading approach that had been employed in \textit{Mills v. Duryee}, 11 U.S. (7 Cranch) 481, 485 (1813).

\textsuperscript{156} See \textit{Fauntleroy v. Lum}, 210 U.S. 230, 238 (1908).

\textsuperscript{157} Brainerd Currie is generally credited with coining the phrase, if not the concept, of false conflicts. He recognized the similarity between his approach and the Supreme Court’s approach to the full faith and credit clause in the choice of law context. See Currie, \textit{Notes on Methods and Objectives in the Conflict of Laws}, reprinted in B. Currie, \textit{supra} note 133, at 182-83.
fied with this laissez-faire approach, it is easy to see its appeal. In cases where two or more states have an interest in having their law applied—a "true conflict" of laws—there appears to be no national policy that would dictate which state's law should govern. However, in situations in which only one state has an interest in having its law applied, a false conflict is presented and the law of the interested state must be applied.

This is not true in the judgments context. The national policy of uniformity could function as an effective second order principle to resolve true conflicts. It is possible and desirable to have a national judgments recognition rule in situations in which more than one state has an interest in applying its own preclusion rules. Any of the rules discussed earlier—federal preclusion law, the preclusion law of the rendering state, or preclusion law of the state of recognition—would satisfactorily address problems raised in situations presenting true conflicts.

But what of "false conflict" situations—where only one state has an interest in having its preclusion law applied to the case? In such situations, should the policy of uniformity, as expressed in the federal preclusion rule, trump the interest of the only interested state?

Fauntleroy is a case of that type. What interest does Missouri have in precluding Mississippi from reexamining a determination of Mississippi law involving a Mississippi cause of action over a Mississippi contract entered into between citizens of Mississippi? Indeed, if the case took place today the harder question would be whether Missouri had the power to adjudicate the case at all. The only interest Missouri appears to have in the enforcement of its judgment is the integrity of the judgment itself—that Mississippi appears to be undermining the authority of Missouri's courts.

The power of this argument lies in discrimination against the state judgment. In Fauntleroy, the Mississippi court appeared to discriminate against the Missouri judgment insofar as Mississippi probably would not have allowed collateral attack of the prior judgment had it been rendered.

158. See supra note 125.
159. The facts indicate that all the relevant "contacts" from a jurisdictional perspective were with Mississippi, or at least were not with Missouri. It is known that jurisdiction over the defendant was effected on the basis of Lum's transient presence in Missouri. See Fauntleroy, 210 U.S. at 234. Although some have questioned whether this temporary presence in a jurisdiction remains a sufficient basis for the assertion of personal jurisdiction, it unquestionably was considered sufficient during the time of the Fauntleroy case and it has generally been held to be sufficient in modern cases. See, e.g., Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 271 (5th Cir. 1985); Aluminal Indus. v. Newtown Com. Assocs., 89 F.R.D. 326, 329 (S.D.N.Y. 1980); Humphrey v. Langford, 246 Ga. 732, 734, 273 S.E.2d 22, 24 (1980). But see Bernstine, Shaffer v. Heitner: A Death Warrant for the Transient Rule of in Personam Jurisdiction?, 25 Vill. L. Rev. 38, 60 (1979) (arguing that transient jurisdiction does not survive the Supreme Court's decision in Shaffer v. Heitner, 433 U.S. 186 (1977)); Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L.J. 289 (1956) (discussing shortcomings of transient jurisdiction rule).
by a domestic court. But, of course, a domestic court would not have reached the same judgment; had a lower court in Mississippi reached the same determination as had the Missouri court, it would have been reversed on appeal. That is the point of the collateral attack in this instance; it permits Mississippi to correct an erroneous interpretation of Mississippi law on an issue of importance to Mississippi. If Mississippi is unable to collaterally attack the Missouri judgment, the parties will have been able to validate behavior deemed to be illegal and unenforceable by Mississippi.

If discrimination in this context is defined as merely giving a foreign judgment different treatment than a court would give a domestic judgment, then there is discrimination in Fauntleroy. The ultimate question, therefore, is what should be meant by discrimination? If a court treats judgments differently because of specific, justifiable differences in them, the varying treatment should not be viewed as discrimination. In Fauntleroy, the difference in treatment is a result of the substantive law applied by the Missouri court and not because it is a Missouri judgment; the difference is thus justified by Mississippi's strong interest in the correct application of its own law.

The full faith and credit issue is thus reduced to whether the national interest in uniformity and certainty combined with Missouri's interest in having Mississippi respect its erroneous interpretation of Mississippi law outweighs Mississippi's interest in correcting an error on a matter of great importance to Mississippi. In a case such as Fauntleroy, where only the state of recognition is interested in the outcome of the case, collateral attack should be permissible and, as will be shown in the next part of the Article, such a result is consistent with the totality of Supreme Court case law.

B. Exceptions to the Plain Reading Approach

The Supreme Court has departed from its literal reading of the full faith and credit statute in certain discrete situations. After briefly discussing each of these exceptions, the Article proposes a common explanation: courts of recognition need not be precluded from reexamining issues when they have a strong interest in doing so and the court of rendition has no interest in preventing reexamination.

1. The Land Taboo Cases

The land taboo cases generally involve restrictions on the preclusive effect that states must give to decrees that affect land in the state of recognition. The land taboo reached its zenith in Clarke v. Clarke. In Clarke, Mrs. Clarke, a domiciliary of South Carolina, died leaving an estate consisting of real and personal property located in South Carolina.

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160. See R. Crampton, D. Currie & H. Kay, supra note 125, at 637.
161. 178 U.S. 186 (1900).
and real property located in Connecticut. Her will was probated in South Carolina and provided that her estate be divided in equal shares to her husband and two children, Nancy and Julia. Three months after Mrs. Clarke's death, Julia died intestate. Litigation then ensued to determine the proper disposition of the estates of Mrs. Clarke and Julia.

A South Carolina court decreed that Mrs. Clarke's will worked an equitable conversion of all her real estate, wherever located, into personalty at the time of her death. The husband and the daughters were all represented in the proceedings. A second proceeding was then brought in Connecticut to determine the proper disposition of the Connecticut property. The Connecticut court held that Julia's interest in the Connecticut real estate passed to Nancy by Connecticut's rules of intestate succession.

The Supreme Court of Errors of Connecticut held that Mrs. Clarke's will did not work an equitable conversion of her real property into personalty, at least as to real property situated in Connecticut. Consequently, upon Mrs. Clarke's death, Julia was vested with a one-third interest in the Connecticut property. In doing so, the court acknowledged that if the Connecticut property were deemed to be personalty, South Carolina law would determine its disposition. Under South Carolina's rules of intestate succession, this property would have passed in equal shares to Nancy and Mr. Clarke.

At issue before the Supreme Court was whether Connecticut had given full faith and credit to the South Carolina court's determination that Mrs. Clarke's will worked an equitable conversion of the real property into personalty. The Court found no full faith and credit violation because South Carolina lacked power to determine the status of land located in Connecticut. There are at least two possible interpretations of Clarke. One reading posits that a judgment encumbering land outside the state of rendition need not be recognized by the state of recognition (and state of situs of the land). This reading depends upon the view that a state court lacks subject matter jurisdiction or venue to adjudicate claims relating to land outside the state. This view is thus a specie of the intersystem preclusion rules concerning jurisdictional defects in the

162. See id. at 190.
163. Mr. Clarke sued as executor of Mrs. Clarke's estate and as trustee of the estate of Nancy. A guardian ad litem was then appointed for Nancy. See id. at 187-88.
164. As in the South Carolina proceedings, Nancy was represented by a guardian ad litem. See id. at 188.
165. See id. at 190.
166. See id.
167. See id.
168. See id. at 195.
169. See id. ("Having a right to decide these questions, [Connecticut] was not constrained to adopt the construction of the will which had been announced by the court of South Carolina.")
rendering state. Unless one somehow concludes, however, that Nancy lacked effective participation in the South Carolina proceeding, it is difficult to see why the South Carolina decree is subject to collateral attack, while other allegations that a court lacked power to act are not subject to attack if the parties participated in the first suit.

The more likely reading is that a state court has the power, assuming the existence of personal jurisdiction over the parties, to render a binding in personam judgment determining the rights and obligations of the parties with respect to land situated outside the state. Nonetheless, an act of the state purporting to execute the judgment may be refused recognition in the situs state. In *Fall v. Eastin*, although the Court indicated that a prior Washington judgment concerning the ownership of land in Nebraska would have preclusive effect on the merits in an action to clear title as between the parties appearing in the Washington action, a deed conveying the land drawn by a Washington commissioner to enforce the Washington judgment need not be recognized by a Nebraska court.

The rationale for the *Fall* holding seems to be that a state's interest in administering its process for recording titles to land and land conveyances is so strong that it justifies the state's refusal to recognize an act by another state that interferes with that interest. This interest, which is concerned with providing an orderly way of ascertaining ownership of property for taxation purposes as well as facilitating an orderly succession of title across property holders, is important from both a state and private party perspective. From the point of view of the state of rendition, as long as the determinations made in its original judgment must be respected, it is not offended if its actions to enforce the judgment are not respected. Similarly, the result of *Fall* for future litigants presents few problems. Enforcing the judgment only entails bringing a separate en-

171. See infra notes 232-254 and accompanying text.
172. Justice White suggests that, although a guardian *ad litem* was appointed to represent Nancy in the South Carolina proceeding, the guardian lacked authority to act for her on matters extending beyond South Carolina. See *Clarke v. Clarke*, 178 U.S. 186, 193 (1900). No support is offered for this proposition. Assuming that it is true, however, the guardian had an opportunity to contest the scope of his power in the South Carolina proceeding and so, under traditional doctrine, there had been a waiver of the issue.
173. See, e.g., *Durfee v. Duke*, 375 U.S. 106, 111 (1963) (judgment entitled to full faith and credit even as to questions of jurisdiction if they have been fully and fairly litigated).
175. See id. at 11-12.
177. There is also a federalism component to the land taboo cases in that it was generally thought that a state had *exclusive* jurisdiction over property within its borders. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). Thus, a state that purported to directly affect property outside its borders exceeded its jurisdiction, even if it had in personam jurisdiction over the owner of the property.
enforcement action in a court in the state of situs.\textsuperscript{178}

Nonetheless, even the \textit{Fall} type of land taboo represents a shift from the plain reading rule. Under \textit{Fall}, the court of recognition can refuse to enforce the judgment, at least as to the specific remedy, if it determines that the prevailing party in the original action is not entitled to receive title to the property. This could happen, for example, if the court of recognition determines that the losing party did not have title to the property at the commencement of the original action, or that title had passed to someone else prior to the date of enforcement. Presumably, in making these or other determinations of ownership, the state of recognition would be free to apply its own law and not the law of the state of rendition. As a result, a state court could legitimately refuse to confer title to a prevailing party if it had determined, under its own law, that there had been an intervening bona fide purchaser of the property for value.

\section{2. Workers' Compensation}

The Supreme Court has fashioned another exception to a literal reading of the full faith and credit statute in the workers' compensation area. In \textit{Magnolia Petroleum Co. v. Hunt},\textsuperscript{179} the Court employed a plain reading of the statute to preclude a state from using its workers' compensation law to supplement an award received in another state under that state's workers' compensation scheme. The Court held that, because the workers' compensation scheme of the state of rendition would preclude additional awards, the state of recognition must also view the issue as so precluded.\textsuperscript{180}

Less than five years later, however, in \textit{Industrial Commission v. McCartin},\textsuperscript{181} the Court backed away from the result in \textit{Magnolia}. The Court held that, at least in the workers' compensation area, unless the state of rendition clearly evinces an intent to preclude additional awards under the laws of other states, other states may employ their own workers' compensation laws to supplement awards.\textsuperscript{182} The \textit{McCartin} logic is difficult to discern and problematic. Some have read it as a special rule dealing only with state administrative proceedings.\textsuperscript{183} Under this interpretation, because the workers' compensation board in a state typically is not empowered to make an award under a scheme other than its own, the worker was never afforded an opportunity to argue in favor of employing a different workers' compensation scheme in his case. Therefore, there was no \textit{judicial} proceeding purporting to extinguish rights of recovery

\textsuperscript{178} See Currie, \textit{supra} note 176, at 672-76.
\textsuperscript{179} 320 U.S. 430 (1943).
\textsuperscript{180} See \textit{id.} at 441-42.
\textsuperscript{181} 330 U.S. 622 (1947).
\textsuperscript{182} See \textit{id.} at 626-28.
\textsuperscript{183} See Reese & Johnson, \textit{supra} note 95, at 176-77.
under other states' workers' compensation law.\textsuperscript{184}

The other explanation of \textit{McCartin} rests on the special nature of workers' compensation. Workers' compensation laws are legislated solutions to matters of tort law. As such, they displace the common law to the extent that they apply.\textsuperscript{185} When a workers' compensation scheme purports to create an exclusive remedy for a worker's injury, as in \textit{Magnolia}, the claim for workers' compensation extinguishes all other claims. However, where the workers' compensation scheme does not purport to exclude other remedies, full faith and credit is not violated when a worker avails himself of those remedies. In \textit{McCartin}, for example, the workers' compensation scheme was held to displace only a claim for recovery under Illinois tort law.\textsuperscript{186} Because it did not purport to extinguish a claim under other states' workers' compensation laws, the award did not preclude supplementation in other states.

This is creative reasoning of the highest order. As Brainard Currie concluded, "the Court . . . reached a desirable result at some expense in terms of judicial candor and fidelity to statutory language."\textsuperscript{187} Although the Court limited its holding to workers' compensation schemes, there is no principled reason for such a limitation.\textsuperscript{188} Even if one could interpret

\textsuperscript{184} Of course, most workers' compensation schemes include a right of review in the state courts. It is far from clear whether a claim in such a proceeding arguing that another states' workers' compensation law should be applied would be allowed. Under the \textit{McCartin} logic, if such a claim were raised and if the state court denied recovery, sister states would be bound by the judgment. This is so because such a judgment would be the equivalent to unmistakable language that the workers' compensation law of the state of rendition was the exclusive remedy for those claimants who avail themselves of the scheme. \textit{See also} Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466-67 (1982) (judicial determination reviewing state administrative action precludes relitigation of the issues in federal court).

\textsuperscript{185} This very notion that common-law rules operate unless displaced by legislation and that one should view the scope of displacement narrowly may be out of step with modern conceptions of governmental power. Under the modern view, all coercive governmental power emanates from legislative bodies, who generally are more accountable to the citizenry. \textit{See}, e.g., A. Bickel, The Least Dangerous Branch 16-23 (1962) (judicial review in tension with the majoritarian assumptions of a democracy); J. Ely, Democracy and Distrust 73-105 (1980) (suggesting a limited scope of judicial review over most areas of law because legislatures are more accountable to the citizenry than are courts). Courts enjoy a subordinate power to interpret laws made by the legislature and to "fill in gaps" left by the legislature in legislative schemes. \textit{See} Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). Under either view, however, it would be legitimate for a court to "legislate" using common-law rules in areas not covered by a statutory scheme.

\textsuperscript{186} \textit{See} Industrial Comm'n v. McCartin, 330 U.S. 622, 630 (1947).


\textsuperscript{188} One explanation is that workers' compensation laws are to be liberally construed in favor of workers. \textit{See} McCartin, 330 U.S. at 628. However, even assuming the truth of this proposition, this would amount to a general pronouncement on a matter of state law made by the Supreme Court, a federal court. This would appear to be at least in serious tension with \textit{Erie} and the Rules of Decision Act, 28 U.S.C. § 1652 (1982) ("except where the Constitution . . . or Acts of Congress otherwise require or provide, [the laws of the several states] shall be regarded as rules of decision in civil actions in the courts of the United States.").
opaque language setting forth the preclusionary effect of judgments, one is left with disquieting notions of federalism. In *McCartin*, we are asked to believe that statutory language providing that "[n]o common law or statutory right to recover damages . . . for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act," bars common-law claims everywhere and statutory claims only if they involve other Illinois statutes. We are then asked to accept the idea that one state may determine the preclusive effect that its judgments are to have in other states.

Assuming the validity of the notion that a state may determine, or at least limit, the preclusive effects of its judgments, it is difficult to see why the principle is not employed more generally. For example, can it not be assumed that, unless the state of rendition explicitly legislates otherwise, the preclusion laws of the state of recognition may be used to determine the effect of the judgment? Why should we ever assume that a judgment under the laws of the state of rendition bars further actions under the laws of other states?

In the face of dissatisfaction over the distinctions drawn in *McCarr-

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190. An explicit provision for resolving statutory conflicts would be highly unusual. Indeed, it is difficult to resist the conclusion that the reference to statutory remedies is an interstate as well as intrastate conflict of law rule.
191. While this aspect of *McCartin* has generated concern among the Supreme Court and some commentators, see Thomas v. Washington Gas Light Co., 448 U.S. 261, 271 & n. 15 (1980), it is not particularly problematic, at least within the limits of the *McCartin* situation. Surely it is within the power of the legislature of the state of rendition to set the scope of the laws it enacts, so long as, in doing so, it acts constitutionally. Assuming that the Illinois legislature has limited the preclusive effect of workers' compensation awards so as to permit additional awards under the laws of other states, what is unconstitutional about its law? There would appear to be no due process problem because the employer's "right" to rely on the Illinois workers' compensation award is explicitly conditioned by the statute itself. Furthermore, it hardly amounts to a full faith and credit violation when a state of rendition permits a state of recognition to give its judgment less faith and credit than would otherwise be given to it.

The real problem in *McCartin* is that no one really believes that the legislature has legislated the preclusive effect of workers' compensation awards. Thus, the question becomes one of a state of recognition disingenuously inferring that the legislature of the state of rendition did not want the usual rule of preclusion to apply. This is a potentially mischievous way of subverting the intent of the full faith and credit statute. It is mischievous not only because the state of recognition is not faithfully applying the law of the state of rendition, but also because there is no way to police the actions of the state of recognition. The only court in a position to police the area, the Supreme Court, is not likely to review many such cases because of its limited capacity to hear cases and because of the lack of a federal question, the underlying issue in the cases being, in essence, a dispute over the meaning of the law of the state of rendition.

192. *McCartin* does not address a situation where a state seeks to have its judgments have more preclusive effect in other states than they have intrastate. That scenario does raise federalism problems.
the Court reconsidered the issue in *Thomas v. Washington Gas Light Co.* Although the Court could not agree on a new rationale to support its result, Justice Stevens' plurality opinion attempted to recast the *McCartin* rationale by employing state interest analysis. Although only a plurality opinion, it represents the most cogent analysis of the Court's full faith and credit approach.

*Thomas* involved an injured worker who could have obtained an award under the workers' compensation laws of either Virginia or the District of Columbia. Thomas initially pursued an award in Virginia. He later sought a supplemental award in the District of Columbia. Although the case could have been decided in favor of Thomas by employing the analysis in *McCartin*, Stevens used the case as an opportunity to reexamine the purposes of full faith and credit.

Justice Stevens cast the full faith and credit problem as one in which national policies mediated a conflict between sometimes competing state interests. The *McCartin* approach was unsatisfactory because it allowed the state of rendition to determine the effect of its judgment in other states, "an unwarranted delegation to the States of this Court's re-

193. See supra note 188. Reese and Johnson have attempted to supply a coherent rationale for the result in *McCartin*. See Reese & Johnson, supra note 95, at 161. One of the rationales, that "the mandate of full faith and credit will on occasion give way before the paramount interests of an individual state," id., was found to be "logically acceptable" but vague. See id. at 164. Professor Reese, reporter for the Restatement (Second) of Conflict of Laws, incorporated the concept in what became section 103 of the Restatement. The idea has not been universally well received. See infra note 261.


197. The worker lived in the District of Columbia and the employer's principal place of business was the District of Columbia. See *Thomas*, 448 U.S. at 279. Under Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935), the District of Columbia had a sufficient relationship to the employer and employee to justify applying its workers' compensation law. Under Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939), Virginia, the place of the accident, also had a sufficient interest in the controversy to apply its workers' compensation law to the accident.

198. The extent to which Thomas actually "chose" the Virginia scheme is unclear. He was admitted to a hospital in Virginia and may have "selected" Virginia law by signing hospital admitting forms. In any event, the voluntariness of Thomas' selection of the Virginia remedy was not crucial to the Supreme Court's analysis.

199. Justice White, joined by Chief Justice Burger and Justice Powell, took this approach. See *Thomas*, 448 U.S. at 286 (White, J., concurring).

200. See id. at 271 & n.15.
Full faith and credit was thus a federal question to be determined by federal standards. The opinion implicitly adopts an approach that focuses on competing state interests. Borrowing from the full faith and credit cases involving choice of law, Stevens invoked "[t]he principle that the Full Faith and Credit Clause does not require a State to subordinate its own compensation policies to those of another State . . ." He then engaged in an interest analysis to determine whether and to what extent Virginia's interest in its judgment should preclude the District of Columbia from supplementing the award.

One can disagree with the specific conclusions that Stevens drew from his interest analysis, but the test itself seems sound. First, Stevens

201. Id. at 271.
202. Stevens suggests that full faith and credit analysis is complicated by the power delegated to Congress to prescribe the effect of state judgments. See id. at 272 n.18. He appears willing to accept that "by virtue of the full faith and credit obligations of the several States [imposed by 28 U.S.C. § 1738], a State is permitted to determine the extraterritorial effect of its judgments; but it may only do so indirectly, by prescribing the effect of its judgment within the state." Id. at 270. Nonetheless, he refuses to read the full faith and credit statute to require the application of the preclusion law of the state of rendition in this case. "We simply conclude that the substantial interests of the second State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause . . ." Id. at 285 (citing Yarborough v. Yarborough, 290 U.S. 202, 227 (1933) (Stone, J., dissenting)). This suggests that Stevens is willing to stray from a plain reading of the full faith and credit statute when doing so effectuates the purposes of full faith and credit.

203. Stevens does cite and quote approvingly several prior Court opinions and scholarly articles, most notably Reese & Johnson, supra note 95. See Thomas, 448 U.S. at 271 n.15, 272, 278 n.23, 279.

204. See id. at 277-86.


207. See id. at 280-86.

208. The author disagrees with Stevens' analysis minimizing Virginia's interest in placing a ceiling on the liability of employers doing business in the state. Stevens argues that, because an injured worker from another state could initiate proceedings in the other state, Virginia's interest, although valid, could be subverted by well-advised workers. See id. at 284. That argument is flawed because it allows admittedly loose choice of law rules to affect the recognition of judgments issue. Although well-advised workers could subvert Virginia's interests by proceeding initially in the District of Columbia, when suit is brought in Virginia, Virginia is entitled to advance its interests and its interests are reflected in any final award. Thus, applying Stevens' test, the author would conclude that, although the District of Columbia surely has an interest in the accident sufficient to enable it to apply its own law ab initio, once Virginia adjudicates the claim, Virginia's interest in the judgment must be respected.
downplayed preclusion values and focused on full faith and credit values. This adds considerable clarity to the analysis. For example, certainty in the judgment was dismissed as a red herring. Stevens observed that, because the employer knew that it could be susceptible to recovery under either the District of Columbia or Virginia scheme, it had to have planned for recovery under the more generous scheme. To preclude further recovery under the guise of certainty and repose for litigants would only serve to give the employer the benefit of an employee's foolish decision. It would have no effect on the employer's actions. Similarly, the effect on repose would be minimal because all issues litigated in the first proceeding would be binding in the second proceeding; the facts and all legal determinations of the Virginia court would be binding in the District of Columbia proceeding. Stevens correctly saw the circularity of the argument that full faith and credit should protect litigants' "rights" in a judgment because it depends on an assumption that such rights exist. A litigant's right in a judgment only exists to the extent that the preclusion laws of the court of rendition or the court of recognition confer such rights. The full faith and credit clause does not ensure enforcement of these rights, but helps determine the regime of law that gives content to these rights in a judgment. To assume that rights in a judgment vest according to the preclusion law of the state of rendition is to assume that which must be determined.

Nor does Stevens conflate notions of finality and efficiency with full faith and credit. Although full faith and credit will often have the effect of facilitating efficiency and finality by precluding relitigation of issues and claims, efficiency and finality cannot be seen as the goals of full faith and credit.

Nor are any federal interests articulated. Again, this makes sense.

See also Brilmayer, Legitimate Interests in Multistate Problems: As Between State and Federal Law, 79 Mich. L. Rev. 1315, 1324 n.52 (1981) ("Justice Stevens was undoubtedly right in principle" but he "misapplied this principle to the facts of Thomas, because he disregarded a valid internal law policy—releasing the insurer from further liability of any kind.")

209. See Thomas, 448 U.S. at 279-80. Unlike Stevens' conclusion that the possibility of the higher award negated Virginia's interest in limiting recovery, it is valid to point out that, because of the possibility that District of Columbia law would be applied, the only expectations an employer could form could only be formed upon final judgment. At that point, the question becomes whether the employer then has a right to recognition of the judgment in a particular fashion. This smacks of the same "vested rights" approach to the choice of law that has been discredited by courts and commentators. See, e.g., Currie, On the Displacement of the Law of the Forum, reprinted in B. Currie, supra note 133, at 3, 6 (crediting Walter Wheeler Cook as having discredited the vested rights theory of Joseph Beale, as reflected in the Restatement of Conflict of Laws, "as thoroughly as the intellect of one man can ever discredit the intellectual product of another"). Stevens notes this by pointing to the Court's move, in the workers' compensation area, from the vested rights approach of Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932), to Alaska Packers and Pacific Employers. See Thomas, 448 U.S. at 279 n.24.

210. See Thomas, 448 U.S. at 281.

211. So, recognizing the Virginia award would preclude reexamination of the facts. See id. at 283. However, an unraised claim would not be merged into the judgment
There are no independent federal interests to be served by full faith and credit in this case. Rather, the federal interest is in having a method of resolving interstate conflicts. This, in turn, refocuses the effort on ascertaining state interests and resolving them in a sensible way. Stevens attempts to do exactly that.

Combining Justice Stevens' emphasis on state interests with the dictate of the full faith and credit statute, one ultimately comes up with a "false conflict" test. If the state of rendition has an interest in having its judgment recognized according to its rules of preclusion and the state of recognition has no interest in applying its preclusion rules, the rules of the state of rendition apply. Similarly, if the state of rendition has no interest in having its rules of preclusion applied in the state of recognition and the state of recognition has an interest in applying its own rules of preclusion, it may do so. In the true conflict situation—where both states are interested—the full faith and credit statute directs that the preclusion law of the state of rendition should be applied. If neither state has an interest in having its preclusion law applied, the statute again dictates that the law of the state of recognition should apply.

3. Equity Decrees

Although the full faith and credit statute requires that full faith and credit be given to "judicial proceedings" and not just judgments at law, proceedings in equity traditionally have been subject to a number of exceptions to full recognition. First, to the extent that equity decrees may be modified, they need not be recognized. This is contrary to the letter if not the spirit of the traditional reading of the statute. Because the state of recognition must give the same faith and credit to the equity decree as the state of rendition would, it should be able to modify the equity decree if the state of rendition could do so. However, it does not follow that, just because the decree can be modified, it should be. The decision whether to modify the judgment thus becomes the key question unless an independent reason, such as the interests of the rendering state, argued in favor of preclusion. See id. at 283 & nn. 29-30.

212. It could be argued that, because all choice of law and judgment recognition issues potentially affect the ability of persons and businesses to transact their affairs across state borders, the full faith and credit clause should be used to advance federal substantive values. See supra notes 49-50 and accompanying text. Similarly, choice of law and judgment recognition issues affecting private international transactions could give rise to federal concerns. See Chow, Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law, 74 Iowa L. Rev. 165 (1988). These types of concerns are best addressed through statutory or common-law approaches based on an enumerated federal power, such as the commerce clause or the foreign relations power, rather than using full faith and credit which, by its terms, deals with interstate relations.

213. See infra notes 261-266 and accompanying text.


and one that, contrary to the plain reading approach, is answered by focussing on the interests of the state of recognition.

If the plain reading approach were applied, an equity decree would be modified only if the court of rendition would similarly modify it. In addition, any such modifications would mirror the modifications the court of rendition would have made. In short, the court of recognition would use the choice of law rules of the state of rendition. That this does not tend to occur underscores that the court of recognition is using its equity powers to achieve its own policy objectives.216

This might explain why Justice Stone’s dissent in Yarborough v. Yarborough217 has garnered so much support over the years.218 Yarborough involved an unmodifiable Georgia child support decree. Modification of the decree was subsequently sought in South Carolina, where the child was domiciled. Because the Georgia decree was not modifiable, the Court could not rely on the usual exception to full faith and credit.219 Justice Brandeis, writing for the Court, found that, because Georgia could not modify the decree, neither could South Carolina.220

Justice Stone viewed the problem not as whether the daughter’s claim had merged in the prior Georgia judgment, but as whether “the full faith and credit clause gives sanction to . . . control [by Georgia] of the internal affairs of [South Carolina].”221 As Stone saw it, states had an interest in assuring adequate support for children domiciled there. Georgia thus had an interest in adjudicating the issue initially, and, had the child remained in Georgia, South Carolina could not have allowed modification of the decree.222 But, when the child changed domicile, the state of the

216. The problem is often masked by the fact that, in many domestic relations situations, the legal standards governing the parties’ conduct is the same across jurisdictions. In child custody matters, for example, the standard is typically to choose the custodial parent that is in the best interests of the child. Parents are well aware, however, that a state court will often view the locally-domiciled parent as the better alternative. This problem prompted Congress to enact the Parental Kidnapping Prevention Act, Pub. L. No. 96-611, 94 Stat. 3569 (1980) (codified at 28 U.S.C. § 1738A (1982)), in order to articulate the full faith and credit given to child custody determinations.


218. See, e.g., Restatement (Second) of Conflict of Laws § 103 reporter’s note (1971).


220. The majority opinion specifically limited its holding to the situation before it and did not consider whether the decree could be modified if both the father and the child were domiciled in South Carolina. See id. at 213. This suggests that the Court conceived of the issue as one of competing state interests and that, on the Yarborough facts, the state of rendition had an interest in having its decree remain unmodifiable. If both parties were no longer domiciled in the state of rendition, it would lose this interest, enabling the state of recognition to act on its interest in providing adequate support for children in its borders.

Under this reading of Justice Brandeis’ opinion, the only thing separating him from Justice Stone is the results of a weighing of state interests. Both of them reject the idea that the modifiability of a judgment is a right that somehow vests in the litigants and also reject the idea that the full faith and credit statute compels the result.

221. Id. at 214 (Stone, J., dissenting).

222. See id. at 227.
child’s domicile acquired an interest in her welfare. As a result, South Carolina had an interest in modifying the decree. As Justice Stone recognized, however, the ultimate question is “whether the support and maintenance of a minor child, domiciled in South Carolina, is so peculiarly a subject of domestic concern that Georgia law cannot impair South Carolina’s authority.”

Stone saw this as a false conflict. Georgia lost any interest it had in the welfare of the child when the child moved to South Carolina. Thus, the matter was solely a South Carolina concern and South Carolina was free to modify the decree and award the daughter additional support payments as South Carolina saw fit. One may disagree with Stone’s assessment of state interests but his test appears to be sound.

Thus, Stone’s dissent in Yarborough shows that the real reason for not recognizing equitable decrees is to allow the state of recognition to give effect to its policy concerns, particularly when changes in circumstances, such as a change in party domicile, weaken the interests of the state of rendition in its judgment.

223. See id.
224. Id. at 220.
225. See id. at 227.
226. See Reese & Johnson, supra note 95, at 157 (arguing that the welfare of the child is “peculiarly” the concern of the child’s domicile). One can also conceptualize Stone’s approach in terms of claim preclusion. While domiciled in Georgia, the child had a cause of action, based on Georgia law, for maintenance and support. When she moved to South Carolina, she acquired a new cause of action under South Carolina law. This cause of action did not merge into the Georgia judgment because she was unable to assert the claim in the prior proceeding. Accordingly, she may pursue her “new” claim in South Carolina. See Yarborough, 290 U.S. at 221 (“The measure of the duty is the needs of the child and the ability of the parent to meet those needs at the very time when performance of the duty is invoked.”); see also id. at 214 n.1 (suggesting that the Georgia proceeding adjudicated a right of the mother, not the child, and so “could have no effect upon the present litigation”).
227. It is not clear why Georgia lacks an interest in having its policy of having final determinations of maintenance and support involving Georgia parents enforced in South Carolina. Suppose, for example, that the daughter had been domiciled in South Carolina at the time of the initial Georgia decree. Surely a Georgia court could adjudicate the issue of maintenance and support as an incident to a bilateral divorce. See E. Scoles & P. Hay, Conflict of Laws 508-09 (1982) (incidents of divorce are in personam obligations based on transitory actions). The Georgia domicile of the husband could constitutionally support the application of Georgia law. It is difficult to understand why Georgia could have a constitutionally sufficient interest in applying its law in such a case, but would have no interest in having its judgment enforced.
228. Brainerd Currie concluded that Yarborough was “perfectly outrageous [in its] result” because “clearly no state should thus be allowed to interfere with the important interest of another state in child support.” Currie, supra note 184, at 118.
229. Stone’s dissent in Yarborough raises an issue not squarely present in typical equitable decree case—party expectations. In the typical equity case, we could say that litigants seeking to avoid relitigation had no expectation of repose; the decrees were modifiable by their own terms. In Yarborough, the father might well have developed an expectation of repose by having obtained a nonmodifiable judgment in Georgia. Justice Stone baldly asserts “[t]he Fourteenth Amendment does not enable a father, by the expedient of choosing a domicile other than the state where the child is rightfully domiciled, to avoid the duty which that state may impose for support of his child.” Yarborough v.
The second reason given for denying preclusive effect to equitable decrees is that such decrees are remedial in nature and the court of recognition is free to fashion its own remedies. This argument sweeps too broadly. It is probably true that a court need not enforce an equitable decree that it could not itself make. However, if a court recognizes the remedial device in general, the plain reading approach would argue that it may not discriminate in its use of that device.

4. Procedural Matters

Although the full faith and credit statute has been read to require courts of recognition to refer to the law of the court of rendition to determine the effect of a judgment, it has long been held that the manner of enforcement is subject to the laws of the court of recognition. So, for example, whether the courts of the state of recognition may hear a particular action for enforcement is determined by the law of the state of recognition, subject to certain constraints. Similarly, the state of recognition may apply its statute of limitations in enforcing foreign judgments, even if shorter than the statute of limitations of the state of rendition.

The theory behind this exception to the plain reading approach is that the state of recognition's interests in regulating the operation of its court system is paramount. Any countervailing interests by the state of rendition are adequately handled by the rule of no discrimination against the judgments of the state of rendition.

Yarborough, 290 U.S. 202, 225 (1983). But the father did not move to avoid an obligation of child support—he litigated the issue in a competent court. He then claimed that his obligation had been determined and rights to support had vested in that judgment. The conflict was caused not by his move to Georgia, but by the child's establishment of a South Carolina domicile.

This aspect of Stone's dissent is most troubling, and his reasoning here appears to be flawed. See supra note 227. The author would argue that, although rights to a particular state's preclusion law do not inhere in a judgment, see supra notes 85-91 and accompanying text, there might be equitable considerations that would argue in favor of applying the preclusion law of the state of rendition in certain circumstances, even if full faith and credit would not demand it. See infra notes 284-285 and accompanying text.


232. See Rodgers & Rodgers, supra note 176, at 1367 (citing as examples door closing statutes, statutes of limitations, forum non conveniens, rules governing capacity, bonding requirements and availability of remedies).

233. Under Hughes v. Fetter, 341 U.S. 609, 613 (1951), and First Nat'l Bank v. United Air Lines, 342 U.S. 396, 398 (1952), a state may not discriminate against recognition of foreign law. However, non discriminatory limits on state court jurisdiction, such as door-closing statutes, presumably could validly operate to preclude the recognition of foreign judgments without running afoul of full faith and credit.

The key question, of course, is when is a preclusion rule "procedural" and when is it "substantive"? It smacks of battles fought in other arenas, in the *Erie* doctrine, the Court abandoned bright-line tests in favor of an approach that focused on the balancing of competing state and federal interests. In the choice of law area, the substance/procedure device has been widely seen as an escape device that allows the forum to choose its own law in order to further its substantive policies. The entire enterprise is dubious in the preclusion context because preclusion law itself is generally considered to be a matter of procedure, traditionally defined.

Interestingly, an argument based on the procedure exception was raised and rejected in *Fauntleroy v. Lum.* Lum argued that, because a Mississippi statute provided that futures contracts "shall not be enforced by any court," the Mississippi courts lacked jurisdiction to hear the enforcement action. Justice Holmes seemed to acknowledge that, had the Mississippi statute been jurisdictional in nature, the statute could

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238. *See* Restatement (Second) of Judgments 5 (1982). The problem is compounded when preclusion issues are combined with *Erie* issues. Compare Degnan, *supra* note 67, at 769 (arguing that because preclusion rules are procedural, judgments rendered by federal courts, even if sitting in diversity, are to be recognized in all other courts, in accordance with federal preclusion law) with Burbank, *supra* note 65, at 762-63, 800 (arguing that judgments rendered by federal courts sitting in diversity are to be recognized using the preclusion law that the state court in which the rendering federal court sits would apply, but that in federal question cases federal preclusion law should be used). The intricacies of the issues raised by these two articles range far beyond the scope of this Article. It should be pointed out, however, that both positions seem internally inconsistent. If Degnan is correct that preclusion rules are procedural for *Erie* purposes, they should also be procedural for full faith and credit purposes. Cf. *Sun Oil,* 486 U.S. at 727-29 (1988) (matters that are "substantive" for *Erie* purposes may be "procedural" for choice of law purposes because *Erie*'s notions of federalism require a more restrictive notion of what is "procedural"). As for Burbank's thesis, it seems to wish to tie preclusion rules to the underlying cause of action adjudicated. Yet many concepts of preclusion, most notably the idea of claim preclusion, involve the preclusive effect of prior adjudication on all claims arising out of the same transaction or occurrence. See, e.g., Restatement (Second) of Judgments § 24, at 196 (1982) (prior adjudication extinguishes "all . . . series of connected transactions, out of which the action arose"). How does one determine the preclusive effect of a failure to raise a federal claim in a federal court proceeding based on a transactionally related state-based claim? Burbank's approach appears to provide an ambiguous answer to the question.

239. 210 U.S. 230, 234-37 (1908). Other aspects of *Fauntleroy* are discussed *supra* at text accompanying notes 144-158.

240. *Fauntleroy,* 210 U.S. at 234.
have effectively barred an enforcement action.\textsuperscript{241} However, Justice Holmes was reluctant to read the statute in a way that would withdraw jurisdiction away from a court of general jurisdiction along substantive lines.\textsuperscript{242} He thus recognized that there was a sometimes illusory line between substance and procedure and was reluctant to allow arguably procedural rules to have such large substantive effects.

5. Jurisdictional Defects

Confusion characterizes the rules that control when a court of recognition may examine the court of rendition's jurisdiction over the subject matter or over the parties to a prior judgment. In general, if the jurisdictional issue was raised in the prior proceeding, it may not be raised in the court of recognition. Moreover, even if not raised in the prior proceeding, parties to the prior action may not raise the jurisdictional issues in the recognition action if they appeared in the prior action. This appears to leave the door open for parties to challenge the jurisdiction of the court of rendition if they do not appear in the prior action.

Although this approach developed as a full faith and credit principle,\textsuperscript{243} it can now also be viewed as a due process problem.\textsuperscript{244} Thus, a judgment rendered by a court without affording the litigant notice of the action can now be attacked collaterally within the state of rendition. It therefore does not constitute an exception to the full faith and credit statute at all. More problematic is the situation in which notice and an opportunity to be heard is given, but the party chooses not to appear, claiming that the court is exceeding its jurisdiction on either statutory or constitutional grounds. In those circumstances, the state of rendition could forbid collateral attack without violating due process.\textsuperscript{245} The only reason to permit the court of recognition to examine the jurisdictional issue in that case would appear to be that the federal system's interest in fairness and state sovereignty outweighs any full faith and credit interest in finality.

\textsuperscript{241} See id. at 234-35.
\textsuperscript{242} See id. at 235.
\textsuperscript{243} See, e.g., Pennoyer v. Neff, 95 U.S. 714, 729 (1877) (full faith and credit clause governs enforcement of judgments in states other than rendering state).
\textsuperscript{244} See id. at 729-33. Before the adoption of the fourteenth amendment, the United States Constitution did not directly impose due process constraints on the states. Full faith and credit thus become a vehicle of imposing minimum standards on the quality of a judgment entitled to be recognized. After the adoption of the fourteenth amendment, judgments no longer needed to be attacked collaterally, as due process objectives could be raised directly in the initial proceeding. See id. at 733.
\textsuperscript{245} It could be argued that it violates due process if a court enforces a default judgment in the face of a jurisdictional challenge on the theory that the defendant had not gotten her "day in court." This analysis is too simplistic, however. All due process has ever required is an opportunity to be heard. Thus, assuming that the defendant had received notice and was given an opportunity to be heard, the fact that the defendant chose not to appear is of no constitutional significance. To hold otherwise would render all default judgments vulnerable, as well as eliminating the use of merger and bar.
The full faith and credit analysis is shown by *Pennoyer v. Neff*. At issue in *Pennoyer* was whether a federal court was required to give full faith and credit to an Oregon state court judgment adverse to Neff. A plain reading of the full faith and credit statute would require that the federal court give the prior state court judgment the same preclusive effect as the Oregon state court would. The *Pennoyer* Court, however, took a radically different approach to the problem. After acknowledging that a literal reading of the statute might require recognition of the earlier judgment, the Court stated that this reading had been "qualified." The statute was deemed to apply only "when the court rendering the judgment had jurisdiction over the parties and the subject-matter."

The *Pennoyer* approach acknowledges that state interests can sometimes supersede preclusion values. It ensured that "[a] state's paramount interest in determining the legal status of its citizens and the ownership of property within its boundaries could not be usurped by another state's judicial proceedings." Not only did *Pennoyer* deviate from the plain reading approach, but it did so by interposing a federal standard for jurisdiction. Unlike other issues of preclusion, in which either the law of the state of rendition or the law of the state of recognition would apply, the question in *Pennoyer* of whether the prior judgment was of a sufficient quality to merit recognition was determined by a federal standard. This is true even though, at that time, the state of rendition would be free to recognize its prior judgment.

6. Domestic Relations

In the domestic relations area, the Supreme Court has fashioned a set of rules of recognition, presumably under the full faith and credit and due process clauses, that is inconsistent with the normal rules of in personam or in rem jurisdiction. The general rule is that a court has personal jurisdiction over the parties to a divorce action if either party is a...
domiciliary in the state in which the court sits. As in personal jurisdiction generally, appearance in an action precludes collateral attack of personal jurisdiction in a subsequent action. However, if a party chooses not to appear in the first suit and seeks to attack collaterally the judgment on a personal jurisdiction basis in the second suit, collateral attack is permitted. The standard, however, is not based on the state of rendition's jurisdictional rules, but on an independent assessment of domicile. In formulating this standard, the Court did not accept that the state of rendition had "unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements."

Although couched in standard terminology of jurisdiction and due process, it is difficult to escape the conclusion that divorce cases are different from general civil litigation and that the rules of preclusion are being manipulated to accommodate the concerns of competing states and to protect the interests of the divorcing parties. After burying the fiction that divorce actions were actions in rem, the Court was unwilling to view divorce actions as pure transitory in personam actions. Instead, the Court, under the guise of the full faith and credit clause, set forth a "jurisdictional" standard for the validity of divorce decrees.

255. Williams, 325 U.S. at 239 (Murphy, J., concurring).
256. Professor Smith has commented:

   The Supreme Court's treatment of "migratory" divorce decrees is a good example of the manipulation of the common-law jurisdiction concept. Although rationalized as a jurisdictional issue, the refusal to give preclusive effect to another state's divorce decree has been premised on concern that full faith and credit would interfere with the forum state's right to determine the matrimonial status of its own domiciliaries.

Smith, supra note 6, at 87 (footnote omitted).
257. See Williams v. North Carolina, 317 U.S. 287, 297-302 (1942). Traditionally, an action for divorce could be brought only in the state of the marital domicile. Because of problems in ascertaining the matrimonial domicile in situations where the spouses had established separate domiciles in different states, the rule was altered to allow suit in the domicile of either spouse. See id.

258. See id. at 297. The Court might have been concerned, in part, with the problem of obtaining personal jurisdiction over a spouse anywhere but in the spouse's domicile. The problem of personal jurisdiction might have been addressed through the crafting of appropriate long arm statutes. See generally International Shoe Co. v. Washington, 326 U.S. 310 (1945) (personal jurisdiction may be asserted over non-resident defendant as long as the defendant has sufficient contacts or ties with the state of the forum to make it reasonable and just to permit the state to enforce the obligations which the defendant has incurred there). But see Kulko v. Superior Court, 436 U.S. 84 (1978) (California domicile of wife and children not a sufficient contact to subject New York husband to suit in California for custody and child support). The jurisdictional issue, however, seems to mask concerns of choice of law. Rather than police the substantive choice of law used in determining the standards for divorce, the Court has limited jurisdiction in such a way that the forum can always apply its own law. The choice of law approach is raised by Judge Hastie in Alton v. Alton, 207 F.2d 667, 685 (3d Cir. 1953) (Hastie, J., dissenting), vacated as moot, 347 U.S. 610 (1954).

259. The standard, that the action be brought in the domicile of one of the parties, see
This jurisdictional obstacle, however, can be overcome through collusion of the parties. If both parties "appear" in the action, collateral attack on the jurisdiction of the first court is precluded because the parties had an opportunity to litigate the issue in the first proceeding.\(^{260}\)

The divorce recognition cases thus strike a delicate balance between the interests of different states and between the interests of the parties. The parties can, by agreement, bring themselves within the jurisdiction of any state in which one of them arguably can establish a domicile. If there is no agreement, a spouse can bring him or herself within the regime of any state, but must first establish a bona fide domicile there, capable of withstanding independent scrutiny. This accommodates the bona fide interests of both domiciles in that, in the absence of collusion, power is only exercised by an interested state; just as in the area of choice of law, a state should be entitled to apply its own law to a dispute in which it has an interest. Unlike a pure in personam approach, the approach taken in divorce recognition cases ensures that the rendering court has an interest in the outcome.

C. The Thread

If there is a common thread running through the exceptions to the plain reading approach, it is that preclusive effect may be denied by the state of recognition when it has a strong state interest in doing so and the state of rendition lacks an interest in precluding consideration of the issue.\(^{261}\) Justice Stevens' plurality opinion in *Thomas* is explicit on the

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\(^{260}\) *Williams v. North Carolina*, 317 U.S. 287, 300 (1942), is difficult to characterize. It is not typical of personal jurisdiction rules in that it does not focus on the relationship between the defendant and the forum. Indeed, it recognizes the power of a state to adjudicate a divorce as a result of the unilateral action of the plaintiff in establishing a domicile there. *See id.* at 301. Nor is it typical of limitations on subject matter jurisdiction, because state courts are deemed competent, in general, to adjudicate divorces. It is most similar to either notions of jurisdiction to adjudicate an action in rem or venue in local actions. Of course, the Court specifically disavowed the in rem analogy. *See supra* note 257. The local action analogy is also curious. Not only is the premise of the local action rule—the idea that certain actions can only be adjudicated in courts with geographic power over the subject of the suit—presently in disfavor, *see Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 249 S.W.2d 994 (1952), but it is difficult to see why venue should be a matter of constitutional concern.

\(^{261}\) Other attempts have been made, of course, to explain the exceptions to full faith and credit in a systematic way. Most prominent is section 103 of the Restatement (Second) of Conflict of Laws (1971):

> A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.

This formulation, first suggested by Justice Stone's dissent in *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933), *see Restatement (Second) of Conflict of Laws § 103, at 314 (1971)*, was developed in *Reese & Johnson, supra* note 95, at 156-57, 161, 171-77. Professor Ehrenzweig has argued that there is "no authority whatsoever for th[is] startling proposition." Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its
one can explain most of the other exceptions using the same rule.

Consider first the "land taboo" cases. The conventional explanation for the refusal of the state of recognition to enforce judgments affecting land within its borders—that the state of rendition lacked power to act on the property—is a weak explanation at best. Assuming the existence of personal jurisdiction over the parties, the state of rendition has power to determine all rights to property as between the parties. The state of recognition is then bound by the judgment. However, the state of rendition may not, in its enforcement of the judgment, interfere with the property recordation system of the state of recognition. Should it do so, it interferes with valid interests of the state of recognition without furthering an interest of its own. Although it might appear that the state of rendition has an interest in the enforcement of its judgment, this interest is not implicated because the full faith and credit statute guarantees that the rights of the parties as adjudicated in the action will be recognized by the state of recognition.263

Similarly, the interests of the state of recognition in the administration of its courts justify applying its own rules governing the manner in which judgments are recognized, even where these rules differ from those of the state of rendition. Again, the interests of the state of rendition are satisfied as long as the state of recognition does not discriminate against the prior judgment, and as long as the scope of recognition of the prior judgment is determined in accordance with the law of the state of rendition.

The thread develops some knots when it comes to the rules concerning inquiry into the jurisdiction of the court of rendition. In most situations, the state of recognition has no particular interest in examining the jurisdiction of the state of rendition. Where the state of recognition enjoys exclusive jurisdiction, however, examination into jurisdiction is sometimes allowed.264 This rule creates tension if the court of rendition has also considered the question of jurisdiction—who is right? Given the

Withdrawal, 113 U. Pa. L. Rev. 1230, 1240 (1965); see also Note, Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second, 54 Cal. L. Rev. 282, 284-91 (1966) (opposing Restatement’s exception to full faith and credit). The crucial difference between the Restatement’s formulation and this Article’s is the requirement of a "false conflict": not only must the state of recognition have an interest in not recognizing the judgment, but the state of rendition must also have no interest in having the judgment recognized. See also Rodgers & Rodgers, supra note 176, at 1366 ("most, if not all, of the persistent deviations from the requirements of the implementing statute can be fairly analyzed, or at least collected, under the protean rubric of the state-interest exception."); cf. Shreve, supra note 4, at 1210 ("Section 1738 should be read to leave federal courts free to apply federal law to augment the preclusive effects of a state judgment whenever doing so would not frustrate the purpose behind the state’s rule of lesser preclusion and would advance the purpose behind the federal rule of greater preclusion.").

262. See Thomas, 448 U.S. at 285-86.
lack of a superior answer, it might be sensible to forbid reexamination of the jurisdictional issue—at least in all but the clearest cases of error.

As to personal jurisdiction and notice, the general rule—that matters considered in the prior litigation may not be reexamined unless the state of rendition would allow collateral attack—reflects the fact that the state of rendition has an interest in the judgment, and that the state of recognition has no interest in reexamining the issue. The fact that collateral attack is permitted when claims of deficient notice or lack of jurisdiction cannot be considered in the prior litigation may be seen more as a matter of safeguarding the litigant's due process rights than in vindicating any interests of the state of recognition. Challenges involving jurisdictional defects may thus be seen as a "creative" use of the full faith and credit clause which, today, is superfluous because of developments under the due process clause.

IV. A General Framework

The foregoing discussion suggests that a general rule may be formulated regarding the faith and credit to be afforded to judgments. Judgments should be given the same faith and credit in the state of recognition as in the state of rendition, unless doing so would adversely affect the interests of the state of recognition without furthering any interests of the state of rendition. In such a situation, the state of recognition may employ a rule that does not discriminate against foreign judgments. This general framework works no change in the bulk of current doctrine. In most situations, states of recognition would continue to treat judgments in the same way as would the courts of rendition. The general framework also accommodates most exceptions to full faith and credit. In a number of areas, however, it departs from at least the logical implications of current doctrine, with its emphasis on a plain reading of the full faith and credit statute, in a number of areas. The discussion now turns to these areas.

A. Legal Determinations Based on the Law of the State of Recognition

Consider the following not so hypothetical case. A and B, both citizens of state X, enter into a contract in State X to be performed in State

265. Cf. Shreve, supra note 4, at 1210 (proposing reading of full faith and credit statute to leave federal courts free to apply federal preclusion rules under certain circumstances); see also id. at 1218 ("To the extent that federal policies are at stake when federal courts are called upon to enforce state judgments, it might be reasonable to expect federal courts to apply their own preclusion doctrine in intersystem cases.").

266. As explained earlier, allowing collateral attack on lack of notice or personal jurisdiction is best seen as a due process concept. See supra notes 243-252 and accompanying text.

267. See Fauntleroy v. Lum, 210 U.S. 230 (1908); see also text accompanying notes 144-159.
X. B fails to perform under the contract. A then sues B not in State X, but in State Y, serving A while A is temporarily in the state. The court in State Y, purporting to apply State X law, finds for A. In a future action in State X, A argues that the State Y judgment should be recognized. B resists recognition, claiming that the court in State Y had misapplied State X law. B prays that all other matters considered by the State Y court, including all factual determinations, should be considered conclusive in the State X proceeding, but that the State X court should be allowed to reconsider matters of State X law.

Under current readings of the full faith and credit statute, B’s prayer would fall on deaf ears. Because State Y would consider the matter of State X law to be res judicata, State X must also deem it to be res judicata. Yet it is difficult to understand what objectives of full faith and credit such a view would further. Certainly, State Y has no interest in seeing its view of State X law prevail, at least outside of its own court system. State X, on the other hand, presumably has a strong interest in seeing that matters decided under its laws are decided correctly. Indeed, unless such a reexamination is allowed, there is no way to correct errors made by the State Y court.268

What accounts for the view that State X may not reexamine State Y’s interpretation of State X law? Certainly, it is not that State Y has an interest in the determination. At best, State Y has an interest only in the facts adduced in the adjudication. Although State Y has an interest in the finality of its judgments, including matters of foreign law, this interest is not implicated when State X resources are expended in relitigating the matter. But what of the fact of the judgment? Doesn’t State Y have an interest in seeing its judgments enforced simply as a validation of state power? This argument has considerable intuitive appeal. Yet, it seems unlikely that State Y would value enforcement of its erroneous judgment above the interests of State X and the litigants in obtaining a correct ruling. Thus, one could probably come to the view that State Y would not want its interpretation of State X law to be binding on State X.269

Because there is no forum interest in precluding relitigation, it is appropriate to consider the problem from the point of view of the prevailing party. Essentially, A must argue that State Y court’s final judgment creates rights that vest in him. This assumes, of course, the existence of vested rights in judgments. This assumption is demonstrably false. Absent the full faith and credit clause, judgments would be recognized only as a matter of comity. Even under the full faith and credit clause, judg-

268. By contrast, errors raising federal issues, such as jurisdiction may be corrected, theoretically, by seeking Supreme Court review. The Supreme Court is not likely, however, to accept review of a case in which the error on appeal is one of a state misapplying another state’s law.

269. This is essentially the rationale of the Supreme Court in McCartin. Analytically, the interest-based approach offered here is more satisfying, just as Stevens’ approach in Thomas is more satisfying.
ments need only be recognized in a nondiscriminatory fashion. Thus, the only basis for the vested right is a statutory one, based on a wooden reading of the full faith and credit statute. 270

But is State X discriminating against State Y judgments? After all, had a State X court reached the same judgment that the State Y court had, surely a second State X court would view the matter to be res judicata as between the parties. The fallacy, of course, lies in the assumption that the State X court would have rendered the erroneous decision under State X law. It is conceivable that a State X trial court could commit such an error, but unlikely that the error could have survived the appellate process in State X. Ultimately, B would have obtained a definitive ruling by State X of State X law. B would have no such opportunity in State Y courts. Thus, there is no discrimination against the State Y court judgment because a comparable State X court judgment would be reviewable on appeal; the two situations are not analogous.

Even if State X is not acting in an overtly discriminatory fashion in redeciding the issue of State X law, it may be destroying the very fabric of our federated system of justice. State X does seem to single out the State Y judgment for special, if not discriminatory, treatment. Can this be justified by assuming, as we must, that State Y courts are competent to decide issues of State X law? Further, doesn't this send off the wrong federalism signals to State Y? Won't State Y be reluctant in the future to choose State X law to decide disputes? If so, State X may have won the battle and lost the war because, although it is able to vindicate its interests in this case, State Y will disregard State X interests in other situations by refusing to apply State X law. 271

These federalism considerations are more problematic and suggest that State X might wish to exercise some restraint before reexamining State X law issues. First, State Y is competent to decide State X law issues, and may in fact be compelled by the full faith and credit clause and the due process clause to apply State X law to a case. 272 As in the case of challenges to the rendering court's subject matter jurisdiction, State X should give considerable deference to the judgment of State Y's court and presume correctness. Precisely because of federalism concerns, State X should be reluctant to reexamine issues decided by the State Y court. It

270. Cf. Note, Intercircuit Conflicts and the Enforcement of Extracircuit Judgments, 95 Yale L.J. 1500, 1513-14 (1986) (proposing that when an intercircuit conflict exists on an issue of law, the court of recognition is not bound by the conflicting rule of the court of rendition, but may treat its precedent as an "intervening change" in the law).

271. There is no hard evidence, however, that courts would actually do this. Notions of comity and fairness to litigants would tend to cause states to adhere to consistent choice of law rules.

272. State Y might also be able to certify the question of interpretation of State X law to a State X court. See 17A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4248, at 168 n.33 (1988) (listing 14 states and one territory that allow courts from other states to certify questions to the highest court of the state).
should reexamine the State X law issue only when the equities are compelling.

One way of measuring the equities is to focus on forum shopping. For example, in the hypothetical, it appears that A chose State Y as the forum in order to obtain State Y's interpretation of State X law. In such a case, the equities favor allowing B to obtain State X's interpretation of State X law.

Similarly, when the defendant bases her claim on the law of the state of recognition, she should not be precluded from obtaining a definitive interpretation of the law in a subsequent action in the state of recognition. Conversely, a losing plaintiff should not be allowed to complain that the state of rendition's erroneous interpretation of the law of the state of recognition when the plaintiff selected the forum.

Finally, A might interpose a "reverse due process" argument against having the State X law issue reheard in State X court. Under this view, it would amount to a denial of due process for State X to give B another bite at the apple. This argument, while superficially appealing, is incorrect. It would render devices affording relief from judgment, such as Federal Rule of Civil Procedure 60(b) unconstitutional. In essence, A wants to take refuge in State Y's mistake; it cheapens the notion of due process to allow A to do so under the guise of the due process clause.

Those who resist this view of the case might be more disposed to accept it if the problem were limited to one of issue preclusion rather than claim preclusion. For example, suppose that A and B entered into a series of contracts. Should an adverse determination with regard to one of the contracts based on a misinterpretation of State X law preclude a State X court from correcting the mistake with regard to a suit based on another contract? Intuitively, this situation appears to involve less discrimination than the claim preclusion situation. Yet it is hard to see why this is so, at least when one focuses on the traditional criteria. It might seem acceptable to allow B to live with the result in a case which she has litigated and lost. Binding her to that same erroneous result, however, even in foreseeable future situations, seems to overstep the line of fairness.

This approach would not lead to unstable judgments. A judgment may be reopened only if a false conflict existed, and once reopened, it cannot be subject to further collateral attack unless another false conflict exists; at most, a limited opportunity for relitigation is presented. Erroneous application of the approach, like any other form of error, may be dealt with by appellate review.273

273. Even under the plain meaning approach, courts can erroneously allow relitigation of an issue. See Treinies v. Sunshine Mining Co., 308 U.S. 66, 75-79 (1939) (federal court must give preclusive effect to the determination of a Washington court that erroneously allowed relitigation of an issue previously decided by an Idaho court).
B. Mutuality of Estoppel

Consider the following hypothetical. A, a California citizen, and B, an Ohio citizen, are passengers in an aircraft owned and operated by C. The flight originated in Chicago and, while flying over Kansas, en route to Phoenix, the plane crashes. A sues C in California; B sues C in Ohio. Each party claims negligence. The airline counters that the crash was caused by a house that was swept up by a tornado and that, accordingly, the accident was due to an act of God, in the face of which it had exercised the requisite amount of care in operating the aircraft. Assume first that the Ohio suit reaches final judgment first, and that judgment is rendered for B. A now seeks to estop C from relitigating the issue of C's liability in his suit.

Had B's suit against C been lodged in California, A's request for collateral estoppel would seem unproblematic. California has abandoned the requirement of mutuality of parties for purposes of issue preclusion, even in the context of "offensive" collateral estoppel.274 However, Ohio still clings to the mutuality requirement.275 Thus, the question posed is whether California violates the full faith and credit statute by applying its own rule of collateral estoppel to the Ohio judgment.

The plain reading approach would dictate that Ohio's rules of preclusion, including its mutuality requirement, be employed in the California action.276 Yet Ohio certainly has no interest in seeing its preclusion law applied in California.277 Conversely, California has a strong state interest in the efficient administration of justice and in applying its own law of preclusion.278

The converse situation presents a more interesting problem. Suppose the California court renders judgment for A before the conclusion of the Ohio action. Could Ohio refuse to give the California judgment collateral estoppel effect? Again, the answer is yes. The interest of the rendering state in the fair and efficient administration of justice simply does not apply when recognition is sought in another state. Indeed, it would be ironic if, under the full faith and credit clause and statute, both Ohio and California could argue that their own rules of preclusion apply to this


277. Ohio might have an interest in not subjecting B to further liability as a result of the Ohio judgment if doing so would subject B to unfair surprise. But, California would likely consider the presence or absence of unfair surprise as a factor in determining whether to employ nonmutual estoppel and, in any event, B is certainly aware of the existence of the suit in California when it litigates the Ohio action, and so is on notice of its possible effect on the California suit.

278. See Casad, supra note 24, at 531-32; Shreve, supra note 4, at 1210.
case (which probably arose under Kansas law) because such rules are "procedural" matters for the forum, yet other courts would be bound to follow such admittedly procedural rules in determining the effect of the judgment.279

C. Other Procedural Issues

A similar argument could be made with respect to other "procedural" rules such as rules of joinder of claims and parties, and the scope of claim preclusion. The only difference in conceptual approach would be in the equities of allowing relitigation.

Consider rules governing counterclaims. Suppose that the court of rendition has a rule making the joinder of transactionally related counterclaims mandatory and the joinder of other counterclaims permissive.280 Suppose further that the state of recognition makes all counterclaims permissive. What should the state of recognition do when faced with a lawsuit involving an issue that is transactionally related to the suit in the state of rendition? Surely the state of rendition has no interest in having its rule of joinder applied in the state of recognition. The joinder rule reflects a determination by the state of rendition that disputes are most efficiently resolved in a single lawsuit. The state's interest in efficiency, however, is not implicated if another state wishes to entertain the suit. By the same token, the state of recognition has no particular interest in entertaining the claim, except in situations in which the claim involves the law of the state of recognition. In most circumstances, therefore, the equities do not weigh heavily in either direction.281

Assuming, however, that the state of recognition adheres to its own joinder rule, it does not mean that the judgment in the state of rendition has no relevance to the suit in the state of recognition. Any issue decided

279. Professor Overton attempts to deal with the dilemma by deeming preclusion part of the substantive law of the state of recognition. See Overton, The Restatement of Judgments, Collateral Estoppel, and Conflict of Laws, 44 Tenn. L. Rev. 927, 944-45 (1977). Even if characterization were a useful method of proceeding, in general, in interpreting the full faith and credit statute, it is difficult to see how preclusion law may be sensibly referred to as a matter of substantive law. Moreover, if it could be seen as a matter of substantive law, it would be more likely seen as part of the substantive law of the state law giving rise to the cause of action. Cf. Burbank, supra note 65, at 799 ("There may be cases in which the courts of the rendering state would choose to apply the preclusion law of another state, as where the latter's law furnished the rules of substantive law in the initial action and the question is who is bound by the judgment in that action.").

280. See Fed. R. Civ. P. 13(a), 13(b).

281. See Carrington, supra note 140, at 390-91 (state of recognition may refuse to recognize the state of rendition's compulsory counterclaim rule). Professor Carrington relies, in part, on a distinction between the "direct" preclusive effects of a judgment and "collateral" preclusive effect. See id. at 389. He is more likely to apply the preclusion law to claims and issues brought by the plaintiff, because she chose the forum, and so should live by the preclusion rules of the forum; as to matters "collateral" to the initial action, such as the existence of a counterclaim, the defendant, not having chosen the forum initially, might not be bound by that forum's rules on joinder. These types of equitable considerations are discussed at text accompanying notes 284-285.
in the state of rendition would be binding on the parties in the second suit. This, however, could have radically different effects on the suit. For example, consider the situation in which the issue decided in the original suit is resolved favorably for the defendant. The defendant in the state of rendition now brings a suit in the state of recognition involving that issue. If the state of recognition applies the state of rendition’s joinder rule, the original defendant may not raise his claim. However, if the state of recognition permits the action to proceed, the original defendant may use the prior judgment to preclude relitigation of the issue.

Remedies might raise another situation. Suppose that A has been killed as a result of B’s negligence, and A’s estate brings a wrongful death action in State Y, B’s home state. Because the accident occurred in State X, State Y applies the tort law of State X in the suit. But State Y also applies its own ceiling on recovery for wrongful death. Should A’s estate be allowed to seek additional recovery in State X? On the one hand, this case appears indistinguishable from the workers’ compensation cases: under Stevens’ logic in Thomas there should be no bar to further recovery. But if the reason that wrongful death ceilings are imposed irrespective of the substantive law applied is that such ceilings are procedural, State Y would have no interest in precluding further recovery in State X.

Similarly, consider a suit dismissed in State X because the suit is deemed time-barred under State X’s statute of limitations. If the same suit is brought in State Y and State Y would apply its own statute of limitations, could State Y entertain the suit? Again, under State X preclusion law the suit would be barred. But this appears to make little sense, as State X has no interest in precluding further recovery in State X.


283. The Restatement also arrives at the same result, although its reasoning is shaky at best. The Restatement conceives of the problem as one of issue preclusion, not claim preclusion, so that State Y would only be precluded from relitigating whether State X’s statute of limitations had expired. See Restatement (Second) of Conflict of Laws § 110 (1971). This view is difficult to reconcile with notions of claim preclusion. If one adopted this approach more generally, the litigation of a cause of action under State X law would only preclude relitigation of issues determined in the course of adjudicating the cause of action. So, limitations on recovery on account of motorist guest statutes or wrongful death ceilings would only give rise to preclusion on the issue of the applicability of those statutory provisions of the state of rendition and would not preclude litigation of the amount of recovery based on the law of the state of recognition. In other words, isn’t the defense of statute of limitations every much an issue going to the merits as any other issue, giving rise to preclusion of reconsideration of that issue? In any case, why couldn’t State X conceive of the problem of statute of limitations as one of claim preclusion and not one of issue preclusion? If it did so, the Restatement approach would be in conflict with the plain meaning approach with its emphasis on treating preclusion matters in the state of recognition in the same manner as the state of rendition would.
D. The Role of Comity and Equitable Considerations

The preceding discussion has assumed in large part that full faith and credit is concerned with state and federal interests and not directly with the rights of litigants to recognition of a particular judgment or law. It also emphasized the interests of the forum’s judicial system in preclusion decisions. This is not to say that a state is required to apply its own preclusion law when the state of rendition is not offended by the application of the preclusion law of the state of recognition. In the interests of comity, the state of recognition might well decide to apply the preclusion law of the state of rendition. Alternatively, the state of recognition might use equitable considerations to determine whether to apply its own preclusion law. For example, it might deem a party who chose the state of rendition to have “waived” the right to have a more lenient rule of preclusion applied to it. The point of rejecting a bright-line rule of preclusion is not to create less preclusion but to allow courts of recognition more flexibility in dealing with judgments of sister states. As long as there is no discrimination in treatment of such judgments, there is no reason that courts of recognition should not be able to develop preclusion rules that sensibly balance the interests of the state of recognition, the state of rendition and the parties.

CONCLUSION

A plain reading of the full faith and credit statute simplifies the full faith and credit problem. But at what cost? This Article has argued that the case law in the intersystem preclusion context recognizes that a plain reading of the full faith and credit statute is not always desirable. The policies arguing in favor of the plain reading, principally uniformity, should give way to an overriding state interest of the state of recognition when federalism principles are not offended by doing so. In fact, such an approach furthers federalism values. If this approach were to be systematically applied, most cases of intersystem preclusion would continue to be decided according to the preclusion law of the state of rendition and most of the “exceptions” to full faith and credit would remain unchanged. However, there will be some cases, such as the Fauntleroy situation and mutuality of estoppel cases, which could be decided differently.

Simplicity does have its virtues. Simplicity, however, was not the guiding principle behind the structure of our systems of government. A Constitution that demarcates roles for a federal government and for state governments, which divides the power of the federal government into three branches, and which envisions a system of federal and state courts

284. See Carrington, supra note 140, at 384, 389.
285. See Brilmayer, supra note 65, at 100.
286. But see Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379-87 (1985) (court of recognition to apply preclusion law of the court of rendition, even when court of rendition has no clear rule of law on point).
with overlapping jurisdiction, is not a document of simplification. The design of the United States is one of accommodating the disparate interests of the states and of the federal government. The full faith and credit clause, one of the few parts of the Constitution to regulate explicitly the relation among states, and the full faith and credit statute, which implements the clause, should reflect this idea of accommodation and federalism. This may make the status of judgments somewhat uncertain and could generate more work for the judicial system as a whole. But, who ever said that our system of government is simple or efficient? Would we have it any other way?