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Limiting the Last-in-Time Rule for Judgments

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INTRODUCTION

The problem of inconsistent judgments on the same claim or issue no longer exists—in theory—thanks mainly to the law of res judicata. True, Edward Coke long ago lamented the "contrarieties of

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verdicts and judgments one against the other."[1] But if the problem did still exist, it would be serious. First, society now recognizes an efficiency interest in avoiding inconsistent adjudications. At best, inconsistency would erode faith in our system of justice and diminish acceptability of its output. At worst, inconsistency would put a party into an impossible situation of conflicting obligations. Second, any decrease in the certainty and stability of repose would create inefficiency. Society has an interest in increasing certainty for the purposes of primary conduct; once a court determines legal relations, we all need to be able to act in the world with assurance that those relations are indeed fixed to some known extent. Society also has an interest in increasing stability in the judicial system; we all benefit when courts treat prior decisions, from the same or other courts, with respect and comity. Third, fairness further argues for equal treatment in similar circumstances, and for furtherance of reliance interests by consistently adhering to prior adjudication.[2]

One of the obvious purposes of our res judicata law is to minimize the possibility of inconsistent judgments.[3] However, the doctrine cannot completely eliminate that possibility. On the one hand, res judicata must be raised in the subsequent action by the party who seeks to take advantage of it.[4] If that party fails to assert the preclusive effect of the former adjudication, a judgment may be rendered in the subsequent action that is inconsistent with the former judgment. On the other hand, inconsistent judgments can result even when the party entitled to rely upon the initial judgment does assert it, but the subsequent court erroneously or willfully refuses to give it preclusive effect, or correctly refuses under its own conflicts law. The subsequent court may assert that some requirement of res judicata is lacking or some exception applies, and the resulting relitigation may then produce a different outcome.

Picture a Mississippi plaintiff who loses a judgment to a New York defendant in New York (Forum #1 or F-1). The plaintiff needs a more favorable forum. For that purpose, she brings an action upon the same claim in Mississippi (F-2). Mississippi disdains New York values and so refuses to recognize, or give effect to, the New York judgment, holding it unworthy of full faith and credit. Proceeding to the merits, the Mississippi court gives judgment for the plaintiff. This

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1. Ferrer v. Arden (1598) 77 Eng. Rep. 263, 266; 6 Co. Rep. 7a, 9a (CP).

2. *Cf.* John C. McCoid, II, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 488–91 (1991) (suggesting some of the following costs are often overstated).

3. ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 31, 33 (2001).

4. *Id.* at 237.

denial of full faith and credit is unconstitutional,[5] so the defendant appeals, unsuccessfully. Finally, the plaintiff decides to go back nearer the defendant's home in pursuit of assets for enforcement, suing upon her Mississippi judgment in New Jersey (F-3).

Thus we encounter "inconsistent judgments," defined in the sense of F-1 and F-2 judgments, between the same parties or their privies, that differently decide the same claim or issue and that would each independently be preclusive in a new action in F-3. To be preclusive, both prior courts had to render valid and final judgments that are recognizable by F-3, where "valid" roughly means no more than that the rendering court possessed jurisdiction and afforded notice.[6] Besides this specific hypothetical, many different circumstances can generate inconsistent judgments.

When inconsistent judgments do come about, how should the law handle them? Under the well-known rule followed in the United States, when there are two inconsistent judgments, it is generally the later judgment that is entitled to res judicata effects.[7] That is, if by failure to assert or apply res judicata two inconsistent judgments are rendered, then the one later rendered has the controlling preclusive effects.[8] This somewhat arbitrary practice is called the last-in-time rule. It forms part of our constitutional doctrine of full faith and credit.[9]

So our New York defendant will have to pay in New Jersey.[10] Full faith and credit means that F-3 must bow to an erroneous, even unconstitutionally erroneous, judgment by F-2, and thus give no faith

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5. *See* Fauntleroy v. Lum, 210 U.S. 230 (1908) (holding that Mississippi cannot reject a sister-state judgment on the basis of local policy).

6. *See infra* note 120.

7. *See* Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518 (1986) (giving strong support for the last-in-time rule in the federal-state-federal setting).

8. On the meaning of "rendered," see RESTATEMENT (SECOND) OF JUDGMENTS § 14 (AM. LAW INST. 1982) ("For purposes of res judicata, the effective date of a final judgment is the date of its rendition, without regard to the date of commencement of the action in which it is rendered or the action in which it is to be given effect.").

9. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. b (AM. LAW INST. 1971) ("The rule . . . is based upon principles of res judicata and of full faith and credit.").

10. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. c, illus. 1 (AM. LAW INST. 1982) ("A sues B on a promissory note. B denies that he executed the note. There is a trial resulting in a verdict for B, and judgment is rendered in B's favor. A brings a second action against B on the note, and B defaults, and judgment is given for A for the amount of the note and interest thereon. Thereafter A brings an action against B on the second judgment. The judgment for B in the first action is no defense.").

and credit at all to F-1's judgment. Shocking? Now imagine that F-2 is a foreign nation:

> Suppose, for instance, the first judgment is an American judgment. If the second action takes place in Graustark, in the Graustark action one of the parties relies on the American judgment, the Graustark court says, "We will not give any credit to the judgment of an imperialist court," and so the Graustark court just rides over the American judgment.
>
> In that case it seems rather doubtful to me whether in the third action, which takes place in this country again, the court should prefer the Graustark judgment to the American judgment.[11]

Whatever the rationales for applying the last-in-time rule domestically, should an American F-3 ever prefer a foreign F-2 judgment to an American F-1 judgment?

Part I of this Article will lay out the range of application of the last-in-time rule under current law. Part II will question the basis for that rule. Part III will argue for proper limitations on the reach of the rule. The journey is worthwhile because considering how this rather technical problem has been and should be resolved reveals depths of not only res judicata and conflicts theory, but also of the legal process entailed in effectuating that theory.

I. PROBLEMS OF INCONSISTENT JUDGMENTS

These problems of inconsistency arise in a variety of circumstances. These problems also involve the whole range of res judicata, and the last-in-time rule applies throughout.

Repetitive litigation of a claim can occur when the plaintiff sues again to obtain a better outcome. More commonly, the plaintiff may sue again to seek enforcement elsewhere. Alternatively, the defendant may put the claim back in court by pursuing declaratory or

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11. 41 A.L.I. PROC. 277 (1964) (Prof. Rudolf B. Schlesinger). This passage comes from the transcript of the American Law Institute's debates on what would become RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (AM. LAW INST. 1971). Graustark is a fictional country near Romania that was the setting for several novels by George Barr McCutcheon, including BEVERLY OF GRAUSTARK (1904).

injunctive relief from the judgment or its enforcement.[12] Repetitive litigation of an issue can occur when the same issue arises in subsequent litigation, often in the course of a different claim. The issue could constitute part of the merits, or it could be a threshold issue such as jurisdiction.

The parties' incentives that result in inconsistency can cover a broad range. They may fail to raise res judicata as a result of default, out of ignorance, or by way of litigation strategy where one or both parties seek a fresh adjudication. Knowing that some law of res judicata will be in play also can shape strategy, especially through forum-shopping.

Sometimes the genesis of the problem is that something has gone wrong in the application of res judicata, joinder, lis pendens, forum non conveniens, or antisuit injunctions. But often, especially in international litigation, the genesis lies in the absence of control by a higher law or by a higher court of F-2's disrespect for F-1's judgment.

It is therefore important to get a handle on what exactly the last-in-time rule prescribes in all these circumstances. I shall lay out the prescriptions by surveying the rule's application across the three subdoctrines of res judicata.

A. Claim Preclusion

For a claim preclusion example, imagine a plaintiff who won a judgment but remains dissatisfied with the amount of damages awarded. Instead of seeking enforcement of the judgment, she may sue again on the original claim. The defendant relishes another try, especially because he risks less in the second suit (greater damages) than does the plaintiff (total loss). Although the claim merged in the prior judgment for the claimant,[13] neither party asserts res judicata, and so the court holds another trial on the merits of the original claim. The judgment reached in this second action might be for the defendant. Hence, inconsistent judgments can come into existence.

First, if the same claim is presented in a third action, the question will arise as to which, if either, of the now two inconsistent judgments is to be given preclusive effect in the third action. That is, if the originally successful plaintiff were now to bring a third action,

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12. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 567, 1144–45 (5th ed. 2011).

13. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 17(1) (AM. LAW INST. 1982) ("[T]he claim is extinguished and merged in the judgment and a new claim may arise on the judgment . . . .").

which might be either an action on the original claim or an action upon the first judgment, could the defendant invoke the second judgment as a defense? Yes, the second judgment is entitled to res judicata effect under the last-in-time rule.[14]

Second, if the defendant had raised the defense of res judicata in the plaintiff's second action, but the court had refused to consider or uphold it, the result would be the same as if the defense had not been raised, unless the second judgment is appealed and reversed.[15]

Third, if, instead of the defendant's winning the second action in the example, the plaintiff had won a judgment for a greater amount than had been awarded in the first action, maybe even by default, the second judgment would still be the one entitled to res judicata effect.[16]

B. Issue Preclusion

Now, for an issue preclusion example, in F-1 a fact issue may go in favor of *A* over *B*, the issue having been actually litigated and determined and been essential to the judgment. If the same issue arises in a second action in F-2 between the same parties but on a different claim, and *A* fails to raise collateral estoppel or F-2 refuses to consider or uphold it, another trial on the merits might produce an essential determination on the issue in favor of *B*. For a more concrete example, imagine a litigated determination of the value of some land for tax purposes. Both parties think that they could do better. So they both would decline to raise collateral estoppel in litigation of the different claim for a subsequent tax year's liability. Another trial on the merits might yield a different valuation.[17] Hence, again, inconsistent judgments can come into existence.

First, if the common issue appears in a third action in F-3 between the same parties on yet another claim, and *B* raises collateral

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14. RESTATEMENT OF JUDGMENTS § 42 cmt. b (AM. LAW INST. 1942).

15. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. b (AM. LAW INST. 1982) ("[T]he later of the two inconsistent judgments is ordinarily held conclusive in a third action even when the earlier judgment was relied on in the second action and the court erroneously held that it was not conclusive.").

16. *See* RESTATEMENT OF JUDGMENTS § 42 cmt. b, illus. 3 (AM. LAW INST. 1942) (giving as an example a $1000 judgment in F-1 and a $600 judgment in F-2, where the second judgment is protected by the last-in-time-rule).

17. *See* Donald v. J.J. White Lumber Co., 68 F.2d 441, 442 (5th Cir. 1934) (applying the last-in-time rule).

estoppel, what happens in the face of the two inconsistent judgments? F-3 must accept the determination of F-2.[18]

Second, if F-3 and F-1 were in fact the same court, the result would still be that the determination of F-2 prevails. So even though F-1 acted first, and even though the proceeding in F-2 should have been precluded, the court in F-1 must ignore its own previous determination of the issue. Indeed, the result is the same if F-2 is the same court as F-1 or F-3 or both.[19] Although the first judgment normally would not be undone or otherwise overturned, it would stand shorn henceforth of any continuing relief including preclusive effects.[20]

Third, if the third proceeding were not a third action but merely an appeal in F-1 from the first judgment, perhaps even then the determination of F-2 should govern the disposition of the appeal, subordinating the earlier trial court determination in F-1 to the later determination of F-2.[21] Yet the appellate court in F-1 would naturally tend to resist this astounding application of the last-in-time rule. Indeed, the better approach is for the F-1 appellate court to review the lower-court decision in the ordinary way, treating res judicata as any other claim or defense that ordinarily had to have been presented below and thus not bowing to F-2.[22] But in the future, F-2's judgment would be the one with preclusive effects.

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18. *See* RESTATEMENT OF JUDGMENTS § 42 cmt. c, illus. 5–6 (AM. LAW INST. 1942) (giving specific examples in which the judgment of F-2 controls); RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. c, illus. 3 (AM. LAW INST. 1982) (same).

19. *See* RESTATEMENT OF JUDGMENTS § 42 cmt. e (AM. LAW INST. 1942) (stating that the rule is applicable whether the actions are brought in the same or different states); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. a (AM. LAW INST. 1971) ("The rule is applicable irrespective of whether the later inconsistent judgment is rendered in the same State as the original judgment or in a different State.").

20. *See* 2 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 629, at 1327 (Edward W. Tuttle ed., 5th ed. 1925) (1873) (noting that the intervening results of the first judgment should remain in place, to the extent feasible); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4404, at 80–81 (2d ed. 2002) (indicating that the first judgment stands, subject to relief from judgment or restitution).

21. *See* 18 WRIGHT ET AL., *supra* note 20, § 4404, at 77–78 (noting this situation presents a special problem); 18A *id.* § 4433, at 95–96 ("As in other settings, it seems better to accept the second trial-court judgment as binding for purposes of the last-in-time rule.").

22. *See, e.g.*, Sosa v. DIRECTV, Inc., 437 F.3d 923, 927–28 & n.3 (9th Cir. 2006) (considering also what would happen if F-1 were to reverse); Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) ("But because the judgment in this case was first, there is no res judicata issue here."); Am. Postal Workers Union

C. *Jurisdiction to Determine Jurisdiction*

Finally, for an example that involves the subdoctrine of jurisdiction to determine jurisdiction,[23] *P* of F-1 might sue *D* of F-2 in F-1, which upon challenge finds that personal jurisdiction exists over *D*. F-1 gives judgment for *P*. Then *P* brings an action upon the judgment in F-2, where *D*'s assets are. But on collateral attack, *D* asserts that the prior judgment is invalid. F-2 finds that F-1 lacked personal jurisdiction, even though the doctrine of jurisdiction to determine jurisdiction should have foreclosed that issue. F-2 gives judgment for *D*. Finally, *P* sues upon the first judgment in F-3. Upon a new collateral attack, the court in F-3 faces inconsistent judgments.

First, on the issue of personal jurisdiction, F-3 must accept the determination of F-2 as the last-in-time.[24]

Second, even if in the third action *P* had gone back to F-1 in order to utilize the first judgment, F-1 would be obliged to respect F-2's judgment over its own judgment.[25] However, *P* could now sue on his original claim, the statute of limitations permitting.[26]

Third, if F-1's judgment went instead by default, then F-2's decision on personal jurisdiction would not be an inconsistent finding, even if the cases' outcomes were inconsistent. F-2's finding on jurisdiction would be preclusive. It is in fact the only decision on F-1's personal jurisdiction, which decision is binding under the ordinary rules of issue preclusion.[27] Of course, if F-2 had rejected the collateral attack, that decision would have issue-preclusive effect.[28]

Columbus Area Local v. U.S. Postal Serv., 736 F.2d 317, 319 (6th Cir. 1984) (holding that dismissal of an action in F-2 did not mandate dismissal in F-1); *cf.* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) (holding that F-1 on remand must apply F-2's judgment), *cert. denied*, 526 U.S. 1146 (1999); 18 WRIGHT ET AL., *supra* note 20, § 4404, at 78–80 (treating situation where F-2 has entered a preclusive judgment after the F-1 trial court has made various nonfinal rulings and before any appeal has been taken).

23. *See generally* KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 357–63, 377–78 (4th ed. 2015).

24. *See* RESTATEMENT OF JUDGMENTS § 42 cmt. b, illus. 4 (AM. LAW INST. 1942) (giving an example in which F-2's determination that F-1 lacked personal jurisdiction controls).

25. *See* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) (holding that F-1 must apply F-2's judgment), *cert. denied*, 526 U.S. 1146 (1999).

26. *See* McDonald v. Mabee, 243 U.S. 90, 93 (1917) (implicitly allowing plaintiff to sue again on the claim); BORN & RUTLEDGE, *supra* note 12, at 1093.

27. *See* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) (holding that F-1 must apply F-2's finding of F-1's lack of jurisdiction and so withdraw F-1's default judgment), *cert. denied*, 526 U.S. 1146 (1999);

II. DISSECTING THE LAW'S RESOLUTION

A. Rationales of the Rule

Think again of that last hypothetical: default judgment in F-1 and successful collateral attack in F-2. Such a situation, where there are technically no inconsistent findings but the judgments are fundamentally at odds, is quite common and is commonly treated as a variation of the problem of inconsistent judgments. It can arise not only when F-2 passes on F-1's invalidity but also where F-2 accepts another ground for F-1's nonrecognizability. F-2's decision on F-1's binding effect is controlling.

Picture a New York plaintiff who wins a judgment by jury verdict in New York. The defendant's assets in New York are few, so the plaintiff needs to enforce the judgment elsewhere. For that purpose, she brings an action upon the judgment in Mississippi. But the Mississippi judge unconstitutionally refuses to recognize the New York judgment, thus giving judgment for the defendant under the influence of local policy. The plaintiff appeals, unsuccessfully. She finally decides to go closer to home for enforcement, suing upon the first judgment in New Jersey. However, the plaintiff will fail in New Jersey.[29] As suggested above, the best explanation for the result in this particular situation rests not so much on any rule for inconsistent determinations, but rather on the rule that F-2's decision on the

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RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. b, illus. 2 (AM. LAW INST. 1971) (saying that F-2's finding is preclusive in F-3). The result rests on issue preclusion, not on claim preclusion, which should not apply to the special cause of action upon a judgment. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 cmt. a (AM. LAW INST. 1971) (treating such action's dismissal based on nonrecognition as being not on the merits); *cf.* RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 766 (12th ed. 2017) (saying merger does not apply to a judgment upon a judgment).

For the similar treatment of the analogous problems involving arbitration awards, see 3 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION §26.05[C][8], at 3636–38, § 27.02[D], at 3790–91 (2d ed. 2014). Because of the specialized complications of the interplay of res judicata with arbitration practices, this Article limits its focus to sequences of only court judgments.

28. *See* Arecibo Radio Corp. v. Puerto Rico, 825 F.2d 589, 592–93 (1st Cir. 1987) (holding that F-2's decision rejecting collateral attack has normal issue-preclusive effect).

29. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(e) reporters' note 4 (AM. LAW INST. 1987) (stating that a state's decision not to recognize a foreign judgment is entitled to full faith and credit in other states); RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. c, illus. 2 (AM. LAW INST. 1982) (noting that the judgment in F-2 is a defense in F-3).

recognizability of F-1's judgment in any other state is binding in F-3 under the ordinary rules of issue preclusion.

The value of this illustration is to reveal that the problem of inconsistent judgments often involves two decisions in F-2: an implicit or express decision on whether to respect F-1's judgment and then a treatment of the merits that differs from F-1's treatment. For those two decisions, different rationales arise to justify F-3's bowing to F-2's judgment as last-in-time.

1. Waiver/Preclusion on Issue of Full Faith and Credit

The party entitled to the benefit of res judicata in the second action was in a position to try to avoid the possibility of inconsistent judgments. On the one hand, if the benefitee failed to avail himself of the opportunity to invoke res judicata, and so allowed the matter to be relitigated, he should not be entitled to complain when the second determination is treated as conclusive in a third action. On the other hand, if the benefitee did assert his right to preclude, but the second court denied it, he should have sought correction of any error by appeal from the second court, as with any other error by a trial court.

The American Law Institute's most recent restatement of the rationale for the last-in-time rule buys into this line of waiver thinking. It reads thus:

> The considerations of policy which support the doctrine of res judicata are not so strong as to require that the court apply them of its own motion when the party himself has failed to claim such benefits as may flow from them. Accordingly, when a prior judgment is not relied upon in a pending action in which it would have had conclusive effect as res judicata, the judgment in that action is valid even though it is inconsistent with the prior judgment. It follows that it is this later judgment, rather than the earlier, that may be successfully urged as res judicata in a third action, assuming that other prerequisites are satisfied. Indeed, the later of the two inconsistent judgments is ordinarily held conclusive in a third action even when the earlier judgment was relied on in the second

> action and the court erroneously held that it was not conclusive.[30]

Nonetheless, the ALI has thereby formulated a mighty peculiar rationale. We are to apply the later judgment because the party who could have benefited from it waived its benefits by failing to urge the F-1 judgment on the F-2 court. However, the ALI's formulation goes on to provide the same result even though that party forwarded the F-1 judgment in the loudest terms possible. It seems that the waiver idea might sometimes give an added motivation to apply the last-in-time rule. But it seems not to qualify as a rationale, because the last-in-time rule applies even when the waiver notion is inapt.

Therefore, as the ALI shifts to the situation of the fighting benefitee, its rationale cannot be waiver. The ALI instead embraces the rationale of res judicata.[31] We should honor F-2's decision

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30. RESTATEMENT (SECOND) OF JUDGMENTS § 15 cmt. b (AM. LAW INST. 1982).

31. Similarly, some authorities forward the rationale that F-2 has implicitly vacated the F-1 judgment. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (AM. LAW INST. 1971) (applying last-in-time "if the earlier judgment is superseded by the later judgment"); 41 A.L.I. PROC. 278–79 (1964) (Prof. Michael Cardozo IV) (debating what would become the Second Restatement's § 114); 1 FREEMAN, *supra* note 20, § 102, at 181 (maintaining that in some states the later judgment governs, "the presumption being that the first one has been vacated"). The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. b (AM. LAW INST. 1971) combines the ideas of waiver and vacatur in its rationale:

> The rule of this Section is based upon principles of res judicata and of full faith and credit. It is appropriate that the losing party should be precluded from attacking the later inconsistent judgment if he has not sought review of this judgment both by the appellate courts of the State of rendition and by the Supreme Court of the United States or if the judgment has been affirmed by these courts. So, if under these circumstances the same issue has been differently decided in different actions between the parties, the determination that is later in time should control if it would have this effect under the local law of the State of rendition. Similarly, if the court in the second action gives consideration to the earlier judgment and decides, for some reason or other, that this judgment does not bar the action, the second judgment should control if it would have this effect under the local law of the State of rendition. To be sure, the later judgment may be erroneous and the first judgment correct. But the parties had the opportunity to litigate the point at issue before the second court to appeal from its judgment and ultimately to seek review by the Supreme Court. The parties should be bound by the later judgment so long as it remains unreversed and

because it is a "thing adjudged." A decision on res judicata is itself entitled to preclusive effect.[32] Indeed, given the complexity of res judicata decisions under American law, with its carefully delineated rules and narrowly crafted exceptions, there is especially good reason to adopt F-2's decision. The point of res judicata is to avoid having to reconsider the prior adjudication. So F-2's decision on res judicata should control even when it was clearly oblivious or wrong on full faith and credit.

Actually, there will be no inconsistent decisions on res judicata. F-1 could not decide the res judicata effects of its own judgment, as only a later case can decide res judicata.[33] Thus, the only decision on res judicata is F-2's. Because it is the only decision on point, this last-in-time judgment will govern. True, the result on a collateral attack for lack of jurisdiction might involve inconsistent jurisdictional decisions from F-1 and F-2, but the real issue for F-3 is the res judicata effect of F-1's conclusion on jurisdiction under the subdoctrine of jurisdiction to determine jurisdiction, and on that issue F-2 has given the only decision.

Rethink the situation in which F-2 decided that res judicata by F-1's judgment did not apply, because of some recognizability, validity, finality, or bindingness defect. F-2 had a reason to do so, and F2 often will have been right. The very idea of res judicata, even as to an earlier decision about res judicata, is that F-3 should not get involved in deciding whether F-2 was right or wrong. Moreover, F-3 simply has no authority to say that F-2 was wrong in deciding that res judicata did not apply. Only a higher court with jurisdiction over F-2 had the authority to review it.

Perhaps, then, waiver and preclusion can work in tandem as a rationale for the last-in-time rule, each rationale applying separately to different situations.[34] First, if the benefitee of the first judgment

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> provided that the judgment would have this effect under the local law of the State of its rendition. If the State where the later inconsistent judgment is rendered applies the ordinary rules of res judicata, this State will hold that the later judgment supersedes the earlier judgment to the extent that the judgments are inconsistent.

32. 18 WRIGHT ET AL., *supra* note 20, § 4404, at 65 & n.29.

33. *See* FIELD ET AL., *supra* note 27, at 293, 767–68 (explaining that only in a second action can res judicata be raised and decided).

34. Such a tandem motivation is known to the law: (a) if the defendant fails to raise personal jurisdiction correctly, the jurisdictional point is waived; but (b) if the defendant raises personal jurisdiction unsuccessfully, the point is precluded by the res judicata subdoctrine of jurisdiction to determine jurisdiction. CLERMONT, *supra* note 23, at 359–60, 363.

fails to invoke it in F-2, then waiver makes the second judgment binding. Second, if the benefitee does assert it, but the F-2 court rejects its bindingness, then F-2's decision on res judicata is binding and, consequently, so should its merits decisions be binding. Together, waiver and preclusion really drive the U.S. acceptance of last-in-time.

2. Simplicity of Looking to F-2 on Issue of Respect for F-1

Other arguments for the last-in-time rule, although hardly overwhelming and far less important than waiver/preclusion, do exist. The initial supporting argument is that looking at the later judgment involves less judicial effort.[35]

If F-3 were to take it upon itself to verify whether F-1's judgment should have been preclusive in F-2, it would have to reexamine that judgment's recognizability, validity, finality, and bindingness, which F-2's judgment may have already indicated are questionable, and probably also examine whether the winner in F-1 had waived the victory by not pushing it sufficiently in F-2. Alternatively, if F-3 were just to switch to a first-in-time rule, it would still have to reexamine the recognizability, validity, finality, and bindingness of F-1's judgment. By virtue of waiver/preclusion, F-3 can duck these questions and just look to F-2's judgment.

Admittedly, F-2's recognizability, validity, finality, or bindingness might be challengeable too. But in the situation of inconsistent judgments, the status of F-1's judgment is necessarily questionable. The status of F-2's judgment might be straightforward. Thus, it should on average slightly reduce the litigatory load to look to the often less challengeable judgment of F-2 rather than look to F-1's questionable judgment.[36]

3. Reliability of F-2 on the Merits

Another line of argument is that the later judgment is perhaps more apt to be well-contested, well-informed, and correct on the

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35. *See* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 416 (1994) (noting that the F-3 court is spared the task of comparing the judgments of F-1 and F-2 and deciding which is correct).

36. *See also infra* note 214 and accompanying text (suggesting another way that first-in-time is actually the more complicated rule).

merits, as it usually resulted from relitigation and redetermination.[37] Additionally, if we abandon formalism for realism, F-2 may very well have manipulated its full faith and credit decision because it felt that F-1 was wrong on the merits. Although res judicata does not customarily look to whether the prior judgment was correct, the lawmaker when formulating a rule of res judicata need not ignore which decisions will on average tend to have been correct.[38]

Counterarguments to this reliability rationale do exist. First, in the most troubling cases, F-3 will have good reason to think that F-2 was wrong, especially on the res judicata effect of F-1's judgment. Any comfort drawn from the supposed wisdom of F-2's judgment is then likely scant. Second, the rest of the world, as we shall see,[39] follows the rule that the first-in-time judgment prevails. Therefore, it is at best a weak reason to favor the last-in-time judgment that it is slightly more reliable.

Other arguments, along the lines that F-2 somehow gave the more legitimate prior decision, vaporize on closer inspection. One such argument stresses that America's early last-in-time precedents arose in a federal nation nurturing full faith and credit, which aimed at converting the American sovereigns from a grouping of "independent foreign sovereignties" into "integral parts of a single nation."[40] The argument runs that this full faith and credit principle naturally implies looking at the nation's latest word without inquiring into whether it was erroneous. However, one could almost as easily argue that full faith and credit implies looking at the first word, given its having subsequently been disrespected. Moreover, elsewhere in the world, federalism has not led to a last-in-time rule.[41]

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37. *See* 18 WRIGHT ET AL., *supra* note 20, § 4423, at 619. One might think that the better-known last-in-time rule for treaties lends some tangential support. It extends the principle of *leges posteriors priores contrarias abrogant* (later laws abrogate prior contrary laws). But the principle rests on textual, structural, historical, and functional grounds different from the grounds for full faith and credit. *See generally* Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

38. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. f (AM. LAW INST. 1982) ("Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct.").

39. *See infra* Part II-C.

40. V.L. v E.L., 136 S. Ct. 1017, 1020 (2016) (quoting Milwaukee Cty. v. M.E. White Co., 296 U.S. 268, 277 (1935)).

41. *See infra* text accompanying notes 137 (Canada) & 148 (Germany).

4. Finality on the Merits

One last rationale is quite different from waiver/preclusion, simplicity, and reliability. In order to avoid relitigation, one of the inconsistent judgments, be it the first-in-time or the last-in-time, must prevail. In other words, the goal of finality calls for having *some* rule in place, even an arbitrary one.

However, this finality argument is not too strong. Supporters of the rule may raise the specter of theoretically endless relitigation, but in fact that risk does not exist. The approach could be that neither F-1's nor F-2's judgment is binding and that F-3's fresh decision will act as the henceforth-preclusive tiebreaker. Alternatively, the system could provide, with nonfatal consequences to itself, that inconsistent results mean no preclusion ever on the point. Yet current law usually eschews both of these approaches,[42] except that inconsistent findings may prevent any future invocation of nonmutual collateral estoppel.[43]

In sum, the last-in-time rule exists because we would like one of the inconsistent judgments to be final, and it might as well be the later judgment both on the logic of waiver/preclusion and also in the interests of simplicity and reliability.[44] The rule is close to being an

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42. *But see* Shaw v. Broadbent, 29 N.E. 238, 241 (N.Y. 1891) (holding that "one estoppel neutralizes the other, and the question is left to be tried over"); *cf.* Bata v. Bata, 163 A.2d 493, 506 (Del. 1960) (dictum) ("It has been suggested that in the face of two conflicting foreign determinations, involving a common question but different causes of action, the court of the forum should disregard both and should proceed at once to the merits."). No case has ever followed the *Shaw* holding, and several have expressly rejected it. *E.g.*, Bd. of Dirs. of Chi. Theological Seminary v. People *ex rel.* Raymond, 59 N.E. 977, 980 (Ill. 1901).

43. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29(4) cmt. f (AM. LAW INST. 1982) (listing as a discretionary factor against nonmutual preclusion that the "determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue"). Nonmutual collateral estoppel differs from the problem of inconsistent judgments in that only one of the prior judgments is potentially preclusive in F-3. The inconsistency of determinations is then just an argument, applicable only in the context of nonmutuality, against giving that judgment its normal preclusive effect.

For another example of nonpreclusion as the solution, the Second Restatement provides that where a judgment rests on alternative findings, neither is binding. *Id.* § 27 cmts. i, o; *see* FIELD ET AL., *supra* note 27, at 822–24 (criticizing the Second Restatement's approach).

44. For such a listing of reasons, see Robi v. Five Platters, Inc., 838 F.2d 318, 322–23 (9th Cir. 1988) (other citations omitted):

> When two inconsistent judgments exist, it is tempting for a court to reexamine the merits of the litigants' dispute and choose the result it likes best. There are important reasons to avoid this

arbitrary rule for the sake of having a rule, but it is not a particularly bad rule.

B. Development of the Rule

1. Emergence

The last-in-time rule merely happened. For the kinds of cases American courts were encountering, the foregoing rationales made last-in-time seem the natural solution. The rule's development adds to the sense of its arbitrariness.

Early on, the problem arose rarely, in state[45] and federal[46] cases. In the primitive problem's sequence of three actions, all three

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> temptation. First, if one party could have raised *res judicata*, but did not, that litigant must bear the cost of its tactic or inadvertence. Second, the most recent court to decide the matter may have considered and rejected the operation of the prior judgment as *res judicata*, and *its* decision should be treated as *res judicata* on the preclusive effect of the prior judgment. Finally, the last in time rule is supported by the rationale that it "'end[s] the chain of relitigation . . . by stopping it where it [stands]' after entry of the [most recent] court's judgment, and thereby discourages relitigation in [yet another] court." *Id.* (quoting *Porter v. Wilson*, 419 F.2d 254, 259 (9th Cir.1969), *cert. denied*, 397 U.S. 1020, 90 S. Ct. 1260, 25 L. Ed.2d 531 (1970)). Therefore, even when we think that the most recent judgment might be wrong, we still give it *res judicata* effect, so that finality is achieved and the parties are encouraged to appeal an inconsistent judgment directly rather than attack it collaterally before another court.

45. *See, e.g., In re* McNeil's Estate, 100 P. 1086, 1090 (Cal. 1909) (involving a sequence of Pennsylvania, California, and California actions, where the winner in F-1 failed to raise the F-1 judgment in F-2); Tyrrell v. Baldwin, 6 P. 867, 869 (Cal. 1885) ("These judgments were rendered in actions between the same parties, in respect to the same subject-matter, and the rule in such cases is that the last judgment concludes."); Bank of Montreal v. Griffin's Estate, 190 Ill. App. 221, 226 (1914) (involving a sequence of three Illinois actions, where the winner in F-1 failed to raise the F-1 judgment in F-2: "[T]he judgment last in point of time is the judgment to which effect must be given . . . ."); Cooley v. Brayton, 16 Iowa 10, 19 (1864) (involving a sequence of three Iowa actions, where the winner in F-1 failed to raise the F-1 judgment in F-2: "He failed to do so, and he is, beyond all question, bound and concluded by the latter decree . . . ."); Bateman v. Grand Rapids & I.R. Co., 56 N.W. 28, 29 (Mich. 1893) (involving a sequence of three Michigan actions, where the winner in F-1 failed to raise the F-1 judgment in F-2: "Plaintiff had an opportunity, in the replevin case, to plead the former judgment, but neglected to do so, and must be held to have waived the estoppel."); Marsh v. Mandeville, 28 Miss. 122, 128 (1854) (involving a sequence of federal,

would likely come in the same jurisdiction,[47] although occasionally the actions would be interjurisdictional but still all American.[48] Mostly the cases involved the situation in which the benefitee of the F-1 judgment failed to raise it in F-2, so that the waiver notion by itself made the last-in-time judgment the natural choice.[49] Eventually, as res judicata doctrine expanded in scope and the case law accumulated, some of the cases involved the court in F-2 actually rejecting F-1's judgment.[50] Still, the policy choice underlying the rule received little discussion in the courts.

A few of these cases emerged from the mists of history to obtain some prominence as standard cites.[51] Even cases not really involving inconsistent judgments came to recite the last-in-time rule as established law.[52] Last-in-time thereby became the accepted

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Mississippi, and Mississippi actions, where the winner in F-1 failed to raise the F-1 judgment in F-2).

46. *See, e.g.*, Donald v. J.J. White Lumber Co., 68 F.2d 441, 442 (5th Cir. 1934) (involving a sequence of three federal actions, where the winner in F-1 failed to raise the F-1 judgment in F-2: "But the government, for reasons of its own, chose not to rely on it in that suit, and in our opinion thereby waived it, and cannot assert it in this case. Where there are two conflicting judgments, the last in point of time is the one which controls.").

47. *See, e.g.*, Bank of Montreal v. Griffin's Estate, 190 Ill. App. 221 (1914) (involving cases all from the same state); Cooley v. Brayton, 16 Iowa 10 (1864) (same); Bateman v. Grand Rapids & I.R. Co., 56 N.W. 28 (Mich. 1893) (same).

48. *See, e.g.*, *In re* McNeil's Estate, 100 P. 1086, 1090 (Cal. 1909) (involving a sequence of Pennsylvania, California, and California actions); Marsh v. Mandeville, 28 Miss. 122, 128 (1854) (involving a sequence of federal, Mississippi, and Mississippi actions).

49. *E.g.*, Donald v. J.J. White Lumber Co., 68 F.2d 441 (5th Cir. 1934); *In re* McNeil's Estate, 100 P. 1086, 1090 (Cal. 1909); Bank of Montreal v. Griffin's Estate, 190 Ill. App. 221 (1914); Cooley v. Brayton, 16 Iowa 10 (1864); Bateman v. Grand Rapids & I.R. Co., 56 N.W. 28 (Mich. 1893); Marsh v. Mandeville, 28 Miss. 122, 128 (1854).

50. *See, e.g.*, Southard v. Southard, 305 F.2d 730, 732 (2d Cir. 1962) ("The substantive defense that the Connecticut divorce was barred by the requirement that that state give full faith and credit to the Nevada decree was one that could have been and indeed apparently was raised in the Connecticut court. Whether that court actually passed upon the defense or not, principles of *res judicata* forbid us to consider it. The appellant's opportunity to attack the Connecticut decree on the merits died with his failure to appeal . . . .").

51. *E.g.*, Tyrrell v. Baldwin, 6 P. 867, 869 (Cal. 1885); Cooley v. Brayton, 16 Iowa 10 (1864).

52. *See, e.g.*, Galvin v. Palmer, 66 P. 572, 573 (Cal. 1901) ("If two judgments have been entered in a cause, and the record—the judgment roll—is silent in reference to the reason therefor, the later in point of time must be deemed the true and final judgment in the case."); Cummins v. Mullins, 210 S.W. 170, 172 (Ky. 1919) ("Where there are two conflicting judgments rendered by the same court

answer, and orthodox enough to appear in early treatises. The leading treatise on judgments stated the last-in-time rule from its first edition of 1873[53] until its fifth and last edition of 1925.[54] In between another treatise stated the rule nicely:

> The last judgment rendered in regard to a matter is *res judicata*.[55] The former judgment must be used to prevent it. . . . But if he does not bring that fact to the attention of the court, or if he does do so, and it is disregarded, in either case the former judgment, the same as all other defenses, is concluded.[56]

Other treatises reaching this topic followed suit, similarly without real explanation or justification.[57] Certainly, neither treatises nor cases made reference to any of the little-known foreign approaches, such as the developing first-in-time rule in England.[58]

In 1886, the U.S. Supreme Court waded in. The little-cited *Dimock v. Revere Copper Co.*[59] involved three actions, as usual. First came Dimock's federal discharge in bankruptcy. Next came a Massachusetts judgment in an action by Revere against Dimock on promissory notes, in which Dimock failed to bring the discharge to the attention of the Massachusetts court and so suffered a loss. Lastly, Revere sued upon its judgment in New York. When Dimock then invoked the discharge, New York instead accepted the last-in-time judgment. The U.S. Supreme Court affirmed:

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upon the same rights of the same parties, growing out of the same contract, that which is later in time will prevail.").

53. A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 332, at 294 (S.F., A.L. Bancroft & Co. 1873) ("Last Judgment Prevails").

54. 2 FREEMAN, *supra* note 20, § 629, at 1326 ("[T]he last judgment controls and determines the rights of the parties.").

55. The cases cited in support were Cooley v. Brayton, 16 Iowa 10 (1864), and Bateman v. Grand Rapids & I.R. Co., 56 N.W. 28 (Mich. 1893).

56. 1 JOHN M. VAN FLEET, RES JUDICATA: A TREATISE ON THE LAW OF FORMER ADJUDICATION § 9, at 91–92 (Indianapolis, Bowen-Merrill Co. 1895) (citing no cases for his assertion regarding nonwaiver situations).

57. J.C. WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS § 339, at 278 (Des Moines, Mills & Co. 1878) ("[H]e cannot afterward attack the last decree."); *see* HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS, INCLUDING THE LAW OF RES JUDICATA (2d ed. 1902) (1891) (making no mention of the point).

58. *See infra* text accompanying note 130.

59. 117 U.S. 559 (1886).

> We are of opinion that, having in his hands a good defence at the time judgment was rendered against him [in F-2], namely, the order of discharge [in F-1], and having failed to present it to a court which had jurisdiction of his case, and of all the defences which he might have made, including this, the judgment is a valid judgment, and that the defence cannot be set up here in an action on that judgment [in F-3].[60]

In 1939, the Supreme Court took a giant step further in its leading case on this problem. *Treinies v. Sunshine Mining Co.* involved a fight over mining company stock between stepdaughter and stepfather.[61] First, a Washington probate court, after making a litigated determination that it had subject-matter jurisdiction, held for the stepfather.[62] Second, he relied on that judgment in an Idaho proceeding, but the Idaho court found that the Washington court had lacked subject-matter jurisdiction.[63] The stepfather unsuccessfully appealed the full faith and credit question to the Idaho Supreme Court and then unsuccessfully petitioned for certiorari.[64] On remand, the trial court determined ownership in the stepdaughter, and the stepfather took no further appeal from that final judgment.[65] Third, Washington's subject-matter jurisdiction and the parties' ownership questions reappeared in an interpleader suit in the District of Idaho, which applied the last-in-time rule in favor of the stepdaughter.[66] The U.S. Supreme Court affirmed: "Even where the decision against validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court. One trial of an issue is enough."[67]

Any waiver argument based on a failure to assert res judicata in F-2 was unavailable on the facts of *Treinies*. Consequently, its holding represents a significant expansion of the last-in-time rule to nonwaiver situations. However, the Court did not explain or justify

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60. *Id.* at 566. Subsequently, the Supreme Court applied the last-in-time rule without formulating, explaining, or justifying it, once citing *Dimock*, Boynton v. Ball, 121 U.S. 457, 463–64 (1887), but usually not citing *Dimock*, *e.g.*, Davis v. Davis, 305 U.S. 32, 39–40 (1938) (semble); Reed v. Allen, 286 U.S. 191, 199 (1932).

61. 308 U.S. 66, 69 (1939).

62. *Id.* at 69–70.

63. *Id.* at 74–76.

64. *Id.* at 74–75.

65. *Id.*

66. *Id.* at 75–76.

67. *Id.* at 78.

itself. None of the courts or the parties involved in the case expressly mentioned "last-in-time," and none cited *Dimock*. Their debate was over whether F-3 should reconsider the duty of F-2 to give full faith and credit to F-1's judgment[68] or whether full faith and credit to F-2's judgment meant ignoring possible errors in that judgment.[69] The Court simply barreled down the latter route by assuming that the latest judgment controlled.[70]

With *Treinies* recently entered on the books, the American Law Institute was compelled to address the matter for the first time. Its involvement would prove crucial because of the Supreme Court's failure to formulate the doctrine explicitly. In fact, through a series of four different projects over the years, the ALI has played an outsized role in the development of the doctrine.

In 1942, the Restatement of Judgments codified and extended the *Treinies* result, by sweepingly providing a last-in-time rule for all of res judicata, whether or not a waiver argument was available. Its blackletter stated: "Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties."[71] The Restatement stated the rule not only as a matter of domestic res judicata law but also as the law governing interstate situations.[72] The appended comments gave no rationale, and the Restatement contained no reporter's notes. The section appeared in essentially identical form in the initial drafts[73] and seems to have received no group attention or discussion at the annual meetings.[74] The broad rule apparently was accepted as well-settled.

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68. Petitioner's Reply to Brief of Respondents Katherine Mason et al. at 13, 23–24, Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) (No. 4).

69. Brief of Respondent, Sunshine Mining Company at 28–34, 39–43, Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) (No. 4).

70. Subsequently, Supreme Court cases just applied the last-in-time rule, citing *Treinies* without formulating, explaining, or justifying the rule. *E.g.*, Sutton v. Leib, 342 U.S. 402, 408 & n.7 (1952); Morris v. Jones, 329 U.S. 545, 552 (1947) (also emphasizing the benefitee's failure to have raised the F-1 judgment in F-2, an argument available on that case's facts).

71. RESTATEMENT OF JUDGMENTS § 42 (AM. LAW INST. 1942).

72. *Id.* cmt. e.

73. *Id.* § 305 (AM. LAW INST. Council Draft No. 1, Jan. 6, 1941) (setting forth a draft that differed from the final § 42 only in lacking what is now illustration 4 and having comments c and d in reverse order); *id.* (AM. LAW INST. Tentative Draft No. 1, Mar. 19, 1941) (setting forth the same draft except that it now included illustration 4).

74. *See* 19 A.L.I. PROC. 282 (July 1, 1941–June 30, 1942) (mentioning the idea only in connection with a different section, with Professor Austin W. Scott as the Reporter responsible for § 42 observing: "It is the last thing that happens that

2. Challenge

By far the premier citation on this subject is the 1969 *Harvard Law Review* article by then-Professor Ruth Bader Ginsburg.[75] It was a simply constructed article. She focused on the internal American approach, putting international litigation to the side.[76] The article proceeded in just two parts.

The first part recited in detail the four leading Supreme Court precedents at that time.[77] She showed how those cases enshrined the last-in-time rule.[78] It applied not only where the benefited party waived the F-1 judgment by failing to assert it, but also where the party strongly resisted F-2's denial of full faith and credit.[79] It applied even where F-1 and F-3 were the same courts.[80]

The second part discussed three state cases that had flouted their seeming duty to apply the last-in-time rule, tending in particular to do so when F-1 and F-3 were the same courts.[81] These cases met

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counts. That is true where the judgments are inconsistent with each other, and it is the last one which makes it binding on the parties even though it is not in the first action."); 18 A.L.I. PROC. 382–432 (July 1, 1940–June 30, 1941) (making no reference to the section at all).

75. Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

76. *Id.* at 804–05.

77. Sutton v. Leib, 342 U.S. 402 (1952) (involving a sequence of Illinois, New York, and Southern District of Illinois marital actions, where F-2 invalidated the F-1 judgment of divorce); Morris v. Jones, 329 U.S. 545 (1947) (involving a sequence of Illinois, Missouri, and Illinois liquidation actions, where the benefitee of the F-1 judgment failed to raise it in F-2); Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) (involving a sequence of Washington, Idaho, and District of Idaho ownership actions, where F-2 erroneously invalidated the F-1 judgment for lack of subject-matter jurisdiction); Dimock v. Revere Copper Co., 117 U.S. 559 (1886) (involving a sequence of District of Massachusetts, Massachusetts, and New York debt actions, where the benefitee of the F-1 judgment failed to raise it in F-2).

78. Ginsburg, *supra* note 75, at 800–11.

79. *See Treinies*, 308 U.S. at 77 (relating that the benefitee of F-1 even sought certiorari in the U.S. Supreme Court on F-2's denial of full faith and credit, although that was on an interim appeal rather than on review of the final decree).

80. *See Morris*, 329 U.S. at 551 ("That determination is final and conclusive in all courts.").

81. *See* Ginsburg, *supra* note 75, 811–19 (discussing *Porter v. Porter*, 416 P.2d 564 (Ariz. 1966) (involving a sequence of Arizona, Idaho, and Arizona land actions, where the benefitee of the F-1 judgment failed to raise it in F-2); *Kessler v. Fauquier Nat'l Bank*, 81 S.E.2d 440 (Va. 1954) (involving a sequence of Virginia, Florida, and Virginia marital actions, where F-2 rejected the F-1 judgment upholding divorce); *Perry v. Perry*, 318 P.2d 968 (Wash. 1957) (involving a sequence of Washington, Massachusetts, and Washington marital actions, where the benefitee of the F-1 judgment failed to raise it in F-2)).

with the professor's clear disapproval[82] and prompted her to call on the Supreme Court to grant certiorari and put down the rebellion.[83]

A point made almost in passing in the article attracted the most attention and still receives regular citation. It was her suggested limitation on F-3's full faith and credit obligation to honor the last-in-time:

> But the Court has not yet considered the ultimate question: where credit for the first state's judgment is demanded but denied in the second state and the diligent pursuit of the appellate route concludes with a denial of certiorari, does the last-in-time rule still apply? Justification for the rule depends on both the full faith and credit obligation of the second state, and the availability of an impartial tribunal to correct the second state's error, should it fail to give the first judgment the respect constitutionally due it. When the impartial arbiter refuses to act, however, the second

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82. *See also id.* at 819–30 (disapproving three cases where the sequence was F-1, F-2, and F-1, and the last court followed the initial F-1 judgment even though it had not been entitled to full faith and credit, say, because it was nonfinal: *Kubon v. Kubon*, 331 P.2d 636 (Cal. 1958); *Colby v. Colby*, 369 P.2d 1019 (Nev. 1962); *Joffe v. Joffe*, 384 F.2d 632 (3d Cir. 1967)); *cf.* 18 WRIGHT ET AL., *supra* note 20, § 4404, at 78–80 (treating situation in F-1 where F-2 has entered a preclusive judgment after the F-1 trial court has made various nonfinal rulings and before any appeal has been taken).

83. Ginsburg, *supra* note 75, at 811–19. Despite her plea, the rebellion still simmers. *See, e.g.*, Medveskas v. Karparis, 640 A.2d 543 (Vt. 1994) (involving a sequence of Vermont, Massachusetts, and Vermont support actions, where the benefitee of the F-1 judgment had raised it unsuccessfully in F-2). *But see, e.g.*, Thoma v. Thoma, 934 P.2d 1066, 1070–71 (N.M. Ct. App. 1996) ("Cases like *Medveskas* exemplify the parochial attitude that the Full Faith and Credit Clause was intended to override."). Denial of certiorari without dissent in cases presenting the problem during her time on the Court include *Stauber v. McGrath*, 555 U.S. 969 (2008) (involving a sequence of Ohio, California, and Ohio paternity actions, where the benefitee of the F-1 judgment had raised it unsuccessfully in F-2; Ohio disregarded the California judgment, and both sides cited her article to the U.S. Supreme Court); *Bruetman v. Herbstein*, 537 U.S. 878 (2002) (involving a sequence of Southern District of New York, Argentina, and Northern District of Illinois actions, where F-3 disregarded the foreign-nation's nonfinal judgment); *Rash v. Rash*, 528 U.S. 1077 (2000) (applying below the last-in-time rule to a sequence of Florida, New Jersey, and Middle District of Florida marital actions, where the benefitee of the F-1 judgment had raised it unsuccessfully in F-2); and *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 526 U.S. 1146 (1999) (holding below that F-1 must apply F-2's finding of F-1's lack of jurisdiction and so withdraw F-1's default judgment). The Supreme Court has cited her article only once, in *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236 n.9 (1998) (Ginsburg, J.).

> state's rejection of the first state's judgment should not automatically become the national solution to the matter in controversy. Rather, the court subsequently confronted with the conflicting judgments should, in effect, provide the check unsuccessfully sought from the Supreme Court.[84]

In her view, if the second action is brought in a different state from the state of the first judgment's rendition; the court in the second action refuses to accord preclusive effect to the first judgment; the appellate courts of the second state affirm; the U.S. Supreme Court denies certiorari; the matter arises in a third action; and the third court finds the second court's full faith and credit decision to be in contravention of the Full Faith and Credit Clause[85] and Act,[86] then the third court should give full faith and credit to the first court's judgment.[87]

3. Retrenchment

The second version of the Restatement of Conflict of Laws in 1971 added a section to treat inconsistent judgments. Expressly relying on the Restatement of Judgments' provision, it stated an elaborated blackletter rule:

> A judgment rendered in a State of the United States will not be recognized or enforced in sister States if an inconsistent, but valid, judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the State where the later judgment was rendered.[88]

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84. Ginsburg, *supra* note 75, at 831–32; *see id.* at 803–04 ("Hence, such a denial of certiorari seems hardly an appropriate basis for endowing F-2 with ultimate authority to displace F-1's adjudication with its own."), 805–06 ("However, when the national tribunal fails to act, despite a properly timed and formally correct invitation for review, some of the distinctions between interstate and international judgments, significant at earlier stages, lose force. . . . Rather, the recognition forum should attempt to function as surrogate arbiter and view the case from the perspective the Supreme Court would have taken had it granted review.").

85. U.S. CONST. art. IV, § 1.

86. 28 U.S.C. § 1738 (2012).

87. *See generally* Ginsburg, *supra* note 75.

88. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (AM. LAW INST. 1971).

Significantly, its final comment qualified the scope of the rule: "It is uncertain whether the rule of this Section will be applied to judgments rendered in a foreign nation."[89] Moreover, its initial comment ungrammatically and ambiguously added this qualification: "The rule of this Section is applicable if the later inconsistent judgment is valid (see § 92) and, provided at least, that the Supreme Court of the United States has not refused to review this judgment."[90] This was a last-minute bow to Professor Ginsburg, whose recently published article received a "see generally" citation in the reporter's note, the only citation to commentary in the note.[91] Unlike the Restatement of Judgments' provision on inconsistent judgments, this section in the Restatement (Second) of Conflict of Laws received hot debate at the annual meeting when first proposed in rather sweeping terms.[92] The provision was attacked on the ground that "it encourages relitigation" and "jurisdiction hunting."[93] On a deeper level, the concerns were over whether the section should extend to foreign-nation judgments[94] and whether it should extend to domestic judgments denying full faith and credit.[95] The section accordingly evolved over time to acquire its foreign-nation qualification and, eventually, the Ginsburg qualification.[96]

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89. *Id.* cmt. d.

90. *Id.* cmt. a. A paragraph added to the end of comment b helped to clarify:

> The rule may be different in a situation where the losing party has been denied review of the later inconsistent judgment by the Supreme Court of the United States. In such a situation, it might be thought inappropriate to require that conclusive effect be given under full faith and credit to the later inconsistent judgment.

91. *Id.* reporter's note.

92. *See* 41 A.L.I. PROC. 275–81 (1964) (defeating a motion to strike the section).

93. *Id.* at 276.

94. *See id.* at 277 (Prof. Rudolf B. Schlesinger); *see also id.* (indicating that the Reporter, Professor Willis L.M. Reese, agreed to qualify the section by adding comment d); *supra* text accompanying note 11.

95. *See* 41 A.L.I. PROC. 276–79 (Messrs. Sigmund Timberg & Robert M. Benjamin). The suggestion seemed to be that the section should apply only to a party who failed to raise full faith and credit in F-2 and pursue it all the way to the U.S. Supreme Court.

96. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 439a (AM. LAW INST. Tentative Draft No. 10, 1964) (setting forth the original draft, which would be applicable to recognizable foreign-nation judgments and which did not contain the Ginsburg qualification); *id.* (AM. LAW INST. Preliminary Proposed Final Draft No. 1, 1966) (adding the qualification for foreign-nation judgments as comment d);

The American Law Institute revisited the problem of inconsistent judgments in 1982's Restatement (Second) of Judgments. Its blackletter read: "When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata."[97] First, as the Judgments project treats only an internal law of res judicata, it does not touch foreign-nation judgments. Second, the drafting effort initially embraced and then abandoned the Ginsburg qualification.[98] The initial reporters, Professors Benjamin Kaplan and David L. Shapiro, posed her hypothetical of denied certiorari as the central question to be faced in drafting the relevant section.[99] In the preliminary draft submitted to the project's Advisers for discussion in October 1972, they followed the earlier Restatement of Judgments and the Restatement (Second) of Conflict of Laws, but added a comment that would allow F-3 to reconsider F-2's full faith and credit decision at the behest of a party denied certiorari.[100] Almost immediately, however, they retreated to a mere cross-reference to the reservation of the point in the Restatement (Second) of Conflict of Laws.[101] That approach carried forward,[102] producing no discussion at the annual meeting.[103] Essentially, the American Law Institute punted on Ginsburg.

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id. § 114 (AM. LAW INST. Proposed Final Draft Pt. 1, 1967) (editing out a reference to foreign-nation judgments in comment a).

97. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (AM. LAW INST. 1982).

98. *See id.* at 38 n.13 (AM. LAW INST. Preliminary Survey, Nov. 26, 1969) (explaining that the Second Restatement would reach interstate situations because RESTATEMENT OF JUDGMENTS § 42 cmt. e (AM. LAW INST. 1942) reached them).

99. *Id.* at 36–38.

100. *Id.* § 41.2 cmt. e (AM. LAW INST. Preliminary Draft No. 2, Aug. 30, 1972) (citing the Ginsburg article):

> However, the constitutional compulsion should not apply if, when the earlier judgment was refused effect in the second action, the party injured contended that the refusal was a denial of full faith and credit, and attempted to carry this contention to the Supreme Court of the United States, but that Court refused review. In those circumstances a court asked to give effect to the later judgment is entitled to consider independently on the merits whether the earlier judgment should have been given conclusive effect under the full faith and credit clause, and if it decides that question in the affirmative, to give conclusive effect to the earlier rather than the later judgment.

101. *Id.* (AM. LAW INST. Council Draft No. 1, Dec. 21, 1972).

102. *Id.* (AM. LAW INST. Tentative Draft No. 1, Mar. 28, 1973).

103. *See* 50 A.L.I. PROC. 288 (1973) (giving brief description of the section by Justice Kaplan, who observed: "There the rule of the road, which is also, I think

The U.S. Supreme Court has since returned to the problem of inconsistent judgments, and its capstone message explained that, for American judgments, American law embodies the last-in-time rule seemingly unadorned by exceptions. In the *Parsons Steel* case,[104] the sequence began with plaintiffs suing a bank for fraud in an Alabama court. A couple of months later, they sued the bank for the same acts under a federal banking statute in the federal court for the Middle District of Alabama. The federal action went to judgment first (F-1), with a decision for the bank. The bank then asserted claim and issue preclusion in the state action, but the state court ruled against res judicata without giving reasons and awarded the plaintiffs $4,000,001 in damages (F-2), against which the bank filed post-trial motions. The bank immediately returned to the same federal district court, which decided that its prior judgment was claim-preclusive and so issued an injunction against enforcement by the state-court plaintiffs (F-3). The court of appeals affirmed in relevant part. The Supreme Court unanimously reversed the federal-court injunction:

> Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.
>
> . . . .
>
> . . . [T]he Full Faith and Credit Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State. Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.[105]

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supported in reason, is that it is the later of the two which is controlling in the third action.").

104. Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518 (1986) (Rehnquist, J.).

105. *Id.* at 524–25. On remand the district court concluded that the Alabama decision was not preclusive because it was still nonfinal and so the court again

Maybe the ALI should have faced its reserved questions. Maybe the Supreme Court should have spoken more precisely, to avoid being seen as sidestepping those questions. If modern law had the gumption to answer, is the Ginsburg exception sound? No.

Although she had no case support for her exception, hers was a plausible proposal. It was arguable that the party claiming the benefit of the first judgment should not be bound by the preclusive effect of the second judgment if the Supreme Court denies certiorari. After all, the party could have done nothing more to avoid an inconsistent judgment, and the nation's neutral arbiter had failed to act. Moreover, her hypothetical has emotional force. It tempts because it involves a past error on preclusion when we are trying to decide about preclusion and because it inspires a distaste for respecting the disrespecting F-2. At the very least, her scenario works well to expose, on peculiarly wrenching facts, the somewhat arbitrarily cruel nature of the last-in-time rule.

Her solution was to cast preclusion aside as a rationale for the last-in-time rule. She in essence embraced waiver as the exclusive rationale. She would apply the last-in-time rule only when waiver, however attenuated, bolstered the second state's judgment. To accommodate the case law, she had to extend waiver to the extreme of requiring the benefitee to pursue the res judicata point as far as possible in F-2, going after the very final judgment all the way to certiorari whether or not it would be rational to do so. Then if the Supreme Court denied audience to the benefitee, the last-in-time rule would cease to apply.

Waiver makes the most sense, however, if what it means is failure to assert res judicata in F-2 at all. Prior cases had utilized preclusion as a partial rationale for stretching the last-in-time rule to situations where the benefitee had in fact asserted res judicata in F-2. A preclusion rationale would honor a final decision of F-2 on res judicata, while her approach would not if the loser banged unsuccessfully on the doors of the U.S. Supreme Court.

Her approach collides with the rest of res judicata doctrine. Res judicata frequently enshrines erroneous judgments, including those to which the Supreme Court has denied certiorari. It needs to do this to accomplish its aims. Errors in applying res judicata are no different from any kind of error. They certainly are no more serious than errors as to due process, equal protection, or the jury right, all being errors as to which res judicata routinely makes courts turn a

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enjoined its enforcement, and the court of appeals affirmed. First Ala. Bank of Montgomery, N.A. v. Parsons Steel, Inc., 825 F.2d 1475 (11th Cir. 1987).

blind eye despite the denial of certiorari. Her giving the relentless, but unsuccessful, res judicata disputant a break clashes with the treatment of all other litigants.[106]

To be consistent with the rest of res judicata, we should protect the second judgment here by the usual last-in-time rule. Additionally, the other rationales for the last-in-time rule carry over. They push toward application of the usual rule even in her extreme scenario. One judgment should prevail as final, without reexamining the merits of the prior judgments. Also, it is more reliable and simpler to accept the last judgment. Yet Professor Ginsburg would have F-3 second-guess F-2's preclusion decision when certiorari had been denied.

The later case law, such as it is, is against her. In *Porter v. Wilson*, the Ninth Circuit had to consider four lawsuits.[107] Arizona had issued the first judgment on ownership of a hotel. Idaho decided that Arizona's judgment was not binding for lack of personal jurisdiction and so rendered an inconsistent judgment.[108] Arizona then decided that the Idaho judgment did not deserve full faith and credit and so stuck to its view of the dispute, a decision on which the U.S. Supreme Court denied certiorari.[109] The District of Arizona, in a new diversity action, decided that the last judgment was binding, whether it was right or wrong, and the court of appeals affirmed: "Defendants' basic error, it seems to us, lies in the mistaken assumption that it was the role of the federal district court to review and revise the decision of the Supreme Court of Arizona on the issue presented to that court under the full faith and credit clause."[110]

In *First Tennessee Bank N.A. Memphis v. Smith*, a Mississippi probate judgment preceded an Arkansas probate judgment, which led to a federal interpleader action.[111] The Arkansas courts, right up to the state supreme court, had refused to recognize the Mississippi judgment because of lack of jurisdiction.[112] The aggrieved bank then had petitioned for certiorari, but the U.S.

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106. *See* 18 WRIGHT ET AL., *supra* note 20, § 4404, at 65–67; *cf.* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 24.29, at 1485 (5th ed. 2010) (seeing her suggestion as foreclosed by *Treinies*).

107. 419 F.2d 254 (9th Cir. 1969).

108. *Id.* at 255–57.

109. *Id.*

110. *Id.* at 258.

111. 766 F.2d 255 (6th Cir. 1985).

112. *Id.* at 255–58.

Supreme Court denied the petition.[113] The federal courts applied the Arkansas judgment as last-in-time.[114]

4. U.S. Summary

Even if some authorities still equivocate on the Ginsburg and foreign exceptions, the blackletter American rule for American judgments is last-in-time.[115] As I have just argued, the Ginsburg exception is unsound and unsupported. But as I shall soon argue, American courts should be wary about extending the last-in-time rule to foreign-nation judgments.[116]

Whose law is dictating this rule and any exceptions? The governing law is the recognition law of F-3.[117] But that law may be subject to external constraints imposed by higher law. That is, this firmly established last-in-time rule, within the United States, is a matter of constitutional law under the Full Faith and Credit Clause in the interstate setting; a matter of the Full Faith and Credit Act and federal res judicata doctrine in the state-federal, federal-state, and

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113. *Id.*

114. *Id.*

115. *See* Rash v. Rash, 173 F.3d 1376 (11th Cir. 1999) (involving a sequence of Florida, New Jersey, and Middle District of Florida marital actions, where the benefitee of the F-1 judgment had raised it unsuccessfully in F-2), *cert. denied*, 528 U.S. 1077 (2000); Sydoriak v. Zoning Bd. of Appeals, 879 A.2d 494, 500 n.7 (Conn. App. Ct. 2005) (involving a sequence of three Connecticut zoning actions, where the benefitee of the F-1 judgment had failed to raise it in F-2); ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW § 42 (6th ed. 2011); HAY ET AL., *supra* note 106, § 24.29, at 1484–85; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §11.3 (6th ed. 2010); 18 WRIGHT ET AL., *supra* note 20, § 4404, at 60 n.23, § 4423, at 619 n.31 (citing many cases). The entirety of discussion on the rule in DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 132 n.20 (2001), follows:

> If two inconsistent judgments are rendered in a single jurisdiction, the later of the two is the one entitled to preclusive effect. See RSJ § 15. The Supreme Court, in interpreting the constitutional obligation of Full Faith and Credit, has made this rule applicable to sister state judgments—even when the losing party in the second action tried without success to invoke the rules of preclusion in that action. Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

116. *See infra* Part III-B.

117. RESTATEMENT OF CONFLICT OF LAWS § 450 cmt. e (AM. LAW INST. 1934); FELIX & WHITTEN, *supra* note 115, § 50; *see* CLERMONT, *supra* note 23, at 434–35 (explaining that in federal diversity actions, F-3's recognition law will be the local state's law).

federal-federal permutations;[118] or a matter of highly uniform state law if F-2 and F-3 are the same U.S. state.[119]

This governing law on recognition needs to be distinguished from other choices of law. Recognition for present purposes means only whether F-3 will look to a prior judgment, *provided that* it is valid, final, and preclusive under applicable law. A valid judgment is one of sufficient quality to withstand an attack in the form of a request for relief from judgment, which will typically lie only for lack of jurisdiction or notice and not for other error.[120] A final judgment is one that is not tentative or provisional, which in the United States generally means it was the trial court's last word on the merits.[121] Preclusion turns on all the rules and exceptions of res judicata law.[122]

When F-3 faces the question of whether F-2's judgment is valid and final, it normally should apply the law of F-2 (which is subject to any applicable external restraints, such as due process and other federal provisions imposed on and becoming part of the F-2's law).[123] When F-3 faces the question of the extent or reach of res judicata based on F-2's judgment, it normally should apply the res judicata law that F-2 would apply (including any applicable external restraints).[124] Thus, once over the initial recognition hurdle, the basic approach is retroverse, in the sense of turning backward to look at F-

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118. *See* FIELD ET AL., *supra* note 27, at 564, 891–905 (giving controlling law for the four basic permutations); *see also id.* at 905–906 (treating tribal courts).

119. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (AM. LAW INST. 1982). *Compare* K.D. Kerameus, *Res Judicata: A Foreign Lawyer's Impressions of Some Louisiana Problems*, 35 LA. L. REV. 1151 (1975) (describing old civilian approach), *with* 1 LA. CIV. L. TREATISE, CIVIL PROCEDURE § 6:7 (2d ed. 2008) (describing the state's shift in 1990 to common-law preclusion).

120. CLERMONT, *supra* note 23, at 381–84.

121. *Id.* at 384–85.

122. *Id.* at 374–78.

123. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92–93, 107 (AM. LAW INST. 1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481(1), 482 (AM. LAW INST. 1987); *see* WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS & CHRISTOPHER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS § 115[b], [d] (4th ed. 2013) (discussing determination of lack of finality in a prior forum and how personal and subject-matter jurisdictional issues can impact the determination).

124. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 94–97 (AM. LAW INST. 1971) (amended 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1) cmt. c (AM. LAW INST. 1987); *see* HAY ET AL., *supra* note 106, § 24.2, at 1440–41, § 24.4, at 1444–45, § 24.29, at 1484 n.4 (discussing the application of the Restatement provisions).

2's view of its own judgment: F-3 lets F-2's law decide what F-2 conclusively adjudicated.[125]

C. Comparative Picture

Before getting to how American courts should treat inconsistent foreign-nation judgments, I need to take a look at how the rest of the world handles the problem of inconsistent judgments. This comparative study will shed light backward on the rationales and development of the American last-in-time rule, as well as forward on treatment of foreign-nation judgments.

In brief, the rest of the world does not follow our last-in-time rule. They follow a first-in-time rule. This comparison reinforces the feeling that our rule is a rather arbitrary one.

1. England and Most of Its Progeny

English and Commonwealth law on res judicata is middlingly expansive.[126] It was slower to develop than American law, and still does not reach as far.[127] It provides fairly narrow forms of claim preclusion and mutual issue preclusion.[128] Yet, it seems poised to expand res judicata further.[129]

On the problem of inconsistent judgments, England's treatises[130] and international cases[131] make clear that it follows the

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125. *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 4 (AM. LAW INST. 2006) (proposing this approach with respect to recognition of foreign judgments); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 70–76 (1984) (discussing the application of this approach in a foreign-judgment context).

126. *See* Casad, *supra* note 125, at 62–63 (discussing English and Commonwealth law).

127. Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 68 RUTGERS U. L. REV. 1067, 1071–73, 1094–96 (2016).

128. *Id.* at 1094–95.

129. *See id.* at 1095–96 (describing the move toward claim preclusion and nonparty use of preclusion).

130. *See* PETER R. BARNETT, RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW § 4.72 (2001) ("Certainly if there are conflicting foreign judgments, each pronounced by a court of competent jurisdiction, the earlier judgment is recognized and given effect to the exclusion of the latter judgment."); K.R. HANDLEY, SPENCER BOWER AND HANDLEY: RES JUDICATA § 17.15 (4th ed. 2009) (stating that if the judgments relate to the same subject matter, the earlier prevails over the later).

first-in-time approach. It seemingly does so on the undertheorized idea that once things are settled, they should remain settled. But it seems to occur to no one that a subsequent decision of nonpreclusion might itself be entitled to preclusion. The Privy Council explained the split from the American approach:

> Some reference was made in the course of argument to the position in the law of the United States of America, where the last-in-time rule appears to be applied in the case of conflicting judgments, at least when the matter arises in an inter-state context where the "full faith and credit" clause of the Constitution applies. . . . The rationale of the rule appears to be that the second judgment has the effect of deciding that the first judgment does not constitute res judicata so that the second constitutes res judicata of that issue as well as of any others that may have been raised. This is so whether or not the issue of res judicata was argued in the second proceeding by the party who was successful in the first, because on ordinary principles a party is not entitled to raise in a later proceeding a point which was open to him in an earlier one but which he did not take. Their Lordships do not consider that the position in the United States is of assistance for present purposes . . . .[132]

Worth noting is that in the international cases generating the first-in-time rule, the first judgment was most often an English judgment.[133]

English law provides the possibility of cross-estoppel, whereby the failure by the winner in F-1 to raise res judicata in F-2 will equitably estop that party, and so F-2 will be the preclusive

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131. *See* Vervaeke v. Smith [1983] 1 AC 145 (HL) (applying first-in-time rule to sequence of English judgment, Belgian judgment, and English action on validity of marriage); E.D. & F. Man (Sugar) Ltd. v. Haryanto [1991] 1 Lloyd's Rep. 429 (CA) (applying first-in-time rule to sequence of English judgment, Indonesian judgment, and English action on validity of contracts).

132. Showlag v. Mansour [1995] 1 AC 431, 443 (PC) (appeal taken from Jersey) (applying first-in-time rule to sequence of English judgment, Egyptian judgment, and Jersey action on who owns bank accounts).

133. Note that in all three of the leading cases in the two preceding footnotes, the first-in-time judgment was English.

judgment.[134] In other words, here England applies a last-in-time rule. These cross-estoppel cases most often are domestic cases. Their rule makes much sense. Failure to raise res judicata is a solid basis for waiver. Just like any other defense, the benefitee is obliged to raise or lose it.

Canada, as a federal country, provides an interesting variation. Its res judicata is founded on the English approach,[135] although it is not immune to influences from the more expansive American approach.[136] For two foreign-nation judgments or two intraprovincial judgments, a Canadian province follows England's first-in-time rule.[137]

The curious thing for an American, however, is that the Canadian federation does not have a full faith and credit provision. The provinces treat judgments from other provinces as foreign judgments.[138] When a province's judgment is inconsistent with another province's judgment or any other foreign judgment, the

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134. *See* Langdon v. Richards (1917) 33 TLR 325 (KB) (holding the government waived its right to res judicata by failing to raise the first judgment in the second action in a sequence of three English actions, and then apparently using F-2's result to dictate result in F-3); *cf.* Magrath v. Hardy (1838) 132 Eng. Rep. 990, 996 (holding in F-2 that a party failing to raise res judicata "has waived any benefit he might have derived from the estoppel"); HANDLEY, *supra* note 130, § 17.16 (seeming to suggest that the cross-estoppel "sets the matter at large" without any preclusion, but actually speaking of the situation in F-2).

135. *See generally* DONALD J. LANGE, THE DOCTRINE OF RES JUDICATA IN CANADA (2000).

136. *See* JANET WALKER ET AL., THE CIVIL LITIGATION PROCESS: CASES AND MATERIALS 330 (7th ed. 2010) ("Pulled between the traditional rigidity of English law and the modern flexibility of US law, Canadian courts have developed this area of the law cautiously, borrowing elements from both the United States and the United Kingdom and developing a distinctively Canadian approach to issue estoppel.").

137. *See* Peter J. Cavanagh & Chloe A. Snider, *Canada*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS IN 29 JURISDICTIONS WORLDWIDE 2014, at 28, 32 (Mark Moedritzer & Kay C. Whittaker eds., 2013) ("Where a foreign judgment that is sought to be recognised conflicts with a prior judgment involving the same parties or their privies, and each judgment (i) was pronounced by a court of competent jurisdiction and (ii) is final and not open to impeachment, the general rule is that the first in time must be given effect to the exclusion of the later in time.").

138. *See* Konstantinos D. Kerameus, *Enforcement Proceedings*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE § 10-9, at 8, § 10-25, at 19 (Mauro Cappelletti ed., 2014); *cf.* Morguard Invs. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 (Can.) (urging in dicta an approach based on full faith and credit). Registration statutes do simplify the process of enforcement for other provinces' judgments. *See* Kurt H. Nadelmann, *Enforcement of Foreign Judgments in Canada*, 38 CAN. B. REV. 68 (1960) (discussing registration statutes).

province will follow its own judgment, regardless of whether it was first or second.[139]

2. Civil-Law Countries

Civil-law res judicata is relatively narrow in scope. Its aim is merely to keep a cause of action, once resolved for either plaintiff or defendant, from being reconsidered. There is little by way of collateral estoppel and jurisdiction to determine jurisdiction, and no res judicata as to res judicata determinations.[140] However, there are signs in a number of countries of a doctrine on the brink of expansion.[141]

On the problem of inconsistent judgments, a striking aspect is the civil law's lack of discussion of the problem as a matter of domestic law. The domestic doctrine, such as it is today, favors the first-in-time rule. When inconsistent judgments inevitably came to present themselves in international litigation, the civilians had to confront it consciously. But defensibly parochial impulses were then in play, so that the codes tended to go with the local judgment whether first or last.

Why does this problem seem smaller to civilians? The explanation might be that we are more comfortable in acknowledging inconsistencies. More probably, the problem arises

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139. *See* Ryder Gilliland & Peter Smiley, *Canada*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS 2016, at 2.7 (Oct. 3, 2016), http://www.iclg.co.uk/practice-areas/enforcement-of-foreign-judgments/enforcement-of-foreign-judgments-2016/canada ("Where there is a conflicting local judgment between the parties or there are local proceedings pending between the parties to the extent that the judgment is not final and conclusive, a foreign judgment will not be recognised or enforced in Canada."); *see also* Civil Code of Québec, S.Q. 1991, c 64, art 3155 (Can.) ("A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases . . . (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec . . . ."). This code provision extends the preference for local proceedings into the arena of pending cases, so that the foreign judgment must bow to a case pending in Quebec. *See* Can. Post Corp. v. Lépine, [2009] 1 S.C.R. 549, para. 55 (Can.) (applying this part of art. 3155(4) so as to prefer a Quebec proceeding over an Ontario judgment).

140. *See* Clermont, *supra* note 127, at 1096–98 (discussing res judicata in civil law countries).

141. *See id.* at 1099–100; *cf.* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 25, 2016, [2016] I.L. Pr. 27, para. 7 (applying jurisdiction to determine jurisdiction to an English judgment).

less often. Why? I think the major reason is the limited scope of their res judicata. Narrower res judicata means that res judicata will apply less often in a second action, to say nothing of a third action. Moreover, without collateral estoppel, the problem would arise only in the more unlikely scenario of repetitive assertion of the same cause of action involving the same parties. In such a scenario the doctrines of res judicata and lis pendens usually will work well to prevent inconsistency from arising in the first place. The doctrines will work even better given that civil-law judges in F-2 can raise them sua sponte,[142] and given that the judges sitting without a jury will avoid inconsistent determinations thanks to the prior judgment being admissible in evidence on the merits.[143] Finally, civil-law countries define "inconsistent" narrowly.[144] The tendency is to require something like legal consequences that mutually exclude each other.[145]

Take Germany as the prime example.[146] Unlike Canadian and U.S. federalism, Germany treats a judgment of any German state as a German judgment, automatically enforceable anywhere in the country.[147] "Conflicts between judgments rendered by different German courts are usually resolved according to the priority principle (Prioritätsprinzip)—'first in time, first in right.'"[148] Although the same principle applies to conflicts between foreign judgments, when the inconsistency is between any German judgment and a foreign judgment, the German judgment prevails. The relevant code prohibits recognition of a foreign judgment between the same parties on the same subject matter if the "judgment is incompatible

142. *See* PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 547–49 (2004) (treating lis pendens); Albrecht Zeuner & Harald Koch, *Effects of Judgments (Res Judicata)*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE §§ 9-34 to -39, -47 (Mauro Cappelletti ed., 2014) (treating res judicata, but noting that France is an exception to the sua sponte practice).

143. Clermont, *supra* note 127, at 1099.

144. *See* MURRAY & STÜRNER, *supra* note 142, at 534–35 (describing German law on res judicata as narrow and discussing the German conception of irreconcilable judgments).

145. *See* Case 145/86, Hoffman v. Krieg, 1988 E.C.R. 645 (defining "irreconcilable" judgments as having mutually exclusive legal consequences).

146. *See* MURRAY & STÜRNER, *supra* note 142, at 525–41 (discussing German recognition of foreign judgments).

147. Kerameus, *supra* note 138, § 10-9, at 8, § 10-25, at 18.

148. MURRAY & STÜRNER, *supra* note 142, at 534 (citing German Code of Civil Procedure [ZPO] Jan. 30, 1877, § 580(7)(a)).

with a judgment delivered in Germany, or with an earlier judgment handed down abroad that is to be recognized."[149]

Basing its recognition law on Germany's, Japan follows the same first-in-time approach.[150] Japan also nicely demonstrates the unwillingness of civil-law courts to recognize or enforce a foreign judgment that is inconsistent with a local judgment. The illustrative case is *Marubeni America Corp. v. Kabushiki Kaisha Kansai Tekkōsho*.[151] In light of the occasionally incensed reactions of the pertinent law review commentary,[152] I do not present this case as fully representative of Japanese law. Nevertheless, the particulars of the case merit consideration.

In 1968 Jerry Deutsch, an employee of the Boeing Company in Washington State, mangled his hand in a large mechanical press.[153] Boeing had bought the press from West Coast Machinery Co. (a Washington corporation), which had bought it from Marubeni America (a New York subsidiary corporation), which had bought it from Marubeni Japan (a Japanese parent corporation), which had bought it from the manufacturer Kansai Iron Works (a Japanese corporation in Osaka).[154]

F-1: Deutsch sued West Coast and Marubeni America in a state court of Washington, alleging a defective press and requesting

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149. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 328(1)(3) (Ger.). This code provision continues on to make a foreign judgment bow to ongoing German proceedings. *See* MURRAY & STÜRNER, *supra* note 142, at 526 n.151; *cf. supra* note 139 (describing Canada's similar approach).

150. Morio Takeshita, *The Recognition of Foreign Judgments by the Japanese Courts*, 39 JAP. ANN. INT'L L. 55, 56, 71 (1996). For China, a country on whose res judicata I have written, Clermont, *supra* note 127, at 1126–40, the approach to inconsistent judgments will likely develop along the same civil-law lines. *See* JIE HUANG, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS 244 (2014) (looking to future); ZHENG SOPHIA TANG, YONGPING XIAO & ZHENGXIN HUO, CONFLICT OF LAWS IN THE PEOPLE'S REPUBLIC OF CHINA 169–71 (2016) (same).

151. Osaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1977, Case No. 4257 (Wa) of 1975, 361 HANREI TAIMUZU [HANTA] 127 (Japan).

152. *See* Takao Sawaki, *Battle of Lawsuits: Lis Pendens in International Relations*, 23 JAP. ANN. INT'L L. 17, 17–19, 28 & n.25 (1979–1980) (criticizing this case at length); Takeshita, *supra* note 150, at 71 & n.16 ("This judgment of the Osaka District Court seems to be strongly in favor of a Japanese judgment in the sense that a foreign judgment may be rejected even if it was finally and conclusively given before the relevant Japanese judgment. . . . Giving priority to a Japanese judgment in such a way as the Osaka District Court ruled would excessively jeopardize the international harmony of decisions . . . . In addition, that solution is inconsistent with the principle of *res judicata*.").

153. Deutsch v. W. Coast Mach. Co., 497 P.2d 1311, 1312 (Wash. 1972).

154. *Id.* at 1312–13.

$275,000.[155] By service in Japan, Marubeni America impleaded Kansai, which attacked jurisdiction.[156] The Supreme Court of Washington upheld jurisdictional power on the ground that Kansai had transacted business in Washington by building the press to Boeing's extensive specifications, by sending to Washington its engineers to test and inspect the press and to oversee repairs, and by sending replacement parts to Washington; moreover, the court found the exercise of jurisdiction not to be unreasonable in view of Kansai's other extensive business in the United States, the burden on Marubeni America, and the location of evidence.[157] On September 17, 1974, the trial court awarded Marubeni America a judgment against Kansai for $86,000.[158]

F-2: Meanwhile, Kansai was not asleep in Japan. It sued Marubeni America in the Osaka District Court to declare nonliability for indemnification.[159] After stretching to find jurisdiction, the Japanese court followed precedent to reject a lis pendens defense by construing the word "court" in the code's prohibition to mean that the prior action had to be pending in a Japanese court.[160] The Washington judgment, valid and final under Washington law, was not final under Japanese law because there was still time to appeal.[161] On October 14, 1974, the Osaka District Court ruled that Marubeni America had no right to indemnity under Japanese contract or tort law.[162]

F-3: Next, Marubeni America sued Kansai upon its Washington judgment in that same Japanese court. In 1977, the court rejected that claim, denying recognition on the ground that the Washington judgment was inconsistent with a Japanese judgment (its own 1974 judgment) and hence was contrary to the public policy of Japan, regardless of the two judgments' sequencing.[163]

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155. *Id.* at 1313.

156. *Id.*

157. *Id.* at 1315.

158. Sawaki, *supra* note 152, at 17.

159. *See* JOSEPH W.S. DAVIS, DISPUTE RESOLUTION IN JAPAN 349 (1996) (describing this common move "as a tactic to thwart the recognition of foreign judgments").

160. *See* MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] art. 142 ("No party shall file a suit concerning a matter presently pending before a court.").

161. *See* TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 7.09[3], [8][a] (Yasuhei Taniguchi et al. eds., rev. 2d ed. 2009) (discussing finality prerequisite).

162. Sawaki, *supra* note 152, at 18.

163. *See* MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] art. 118(iii) (stating as a requirement for recognition that "the contents of the judgment and the procedures for litigation are not contrary to the public order or morals of Japan"); HATTORI &

By any view, this ten-year battle of lawsuits is not a pretty picture. In the U.S. view, the Japanese court in 1974 should probably have given res judicata effect to the Washington judgment. But the Japanese court refused to go that route, and the result was inconsistent judgments. In the Japanese view, the Japanese court in 1977 was likely right in preferring its own prior judgment.

The civilians' preference for local judgments is further indulged by their willingness, as seen in *Marubeni*, to apply their own law to the validity, finality, and bindingness of the foreign-nation's judgment.[164] The result might then be that the foreign nation's judgment never gets into the running as an inconsistent judgment.

3. European Union

Under the 2015 revision of the Brussels Regulation, a member state must not recognize or enforce[165] another member state's judgment "if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed"[166] or "if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed."[167] Irreconcilability arises when the two judgments entail "mutually exclusive legal consequences."[168]

The Regulation thus follows the first-in-time rule, except when F-2 and F-3 are courts of the same member state. However, the Regulation fails to cover the situation where F-1 and F-2 are courts of the same member state, which leaves the problem to the national law of F-1 and F-2.[169] F-3's national law governs when neither F-1

HENDERSON, *supra* note 161, § 14.03[1][a] & n.260 (discussing this public policy exception).

164. *See* FIELD ET AL., *supra* note 27, at 913–15 (contrasting U.S. and foreign approaches); Casad, *supra* note 125, at 75 (suggesting that foreign countries apply their own law, regardless of what they say they are doing).

165. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council, 2012 O.J. (L 351) arts. 45–46.

166. *Id.* art. 45(1)(c).

167. *Id.* art. 45(1)(d).

168. PETER STONE, EU PRIVATE INTERNATIONAL LAW 243 (3d ed. 2014) (discussing Case 145/86, Hoffman v. Krieg, 1988 E.C.R. 645); BRUSSELS IBIS REGULATION 919–28 (Ulrich Magnus & Peter Mankowski eds., 2016).

169. *See* Case C-157/12, Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, [2014] 1 WLR 904, para. 26 (EU) (involving two Romanian courts

nor F-2 is a member state. The national law will normally provide that first-in-time governs.[170]

These EU provisions followed naturally from English and civil-law traditions. First, those traditions follow the first-in-time rule (*prior tempore, potior jure*).[171] Second, the indulgence for local judgments over foreign judgments is typical of international conventions.[172]

4. Comparative Summary

Occasional exceptions aside, the national and EU law that generally prevails in Europe, including in England,[173] fits a simple and coherent pattern: *the first judgment governs—unless one of the inconsistent judgments is a local judgment, which then prevails*. At a glance, the situation there stands in what seems to be stark contrast to the law of the United States.

Why? In this corner of the law, the solution is path-dependent. A legal system's rule arises in a certain context, and then it proceeds to have a life of its own.

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as F-1 and F-2 and a German court as F-3, with the European court concluding that the EU Regulation art. 45 did not apply and saying that "the recognition and enforcement procedures enable a judgment to have the same effect in the Member State addressed as it would have had in the Member State of origin").

170. *See, e.g.*, MURRAY & STÜRNER, *supra* note 142, at 534 (noting that the first-in-time rule governs in Germany, but there are exceptions).

171. Interestingly, however, the EU sometimes breaks with the orthodox first-in-time line. Its Regulation Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility adopts a last-in-time for judgments on parental responsibility for the care and custody of children. No. 2201/2003, 2003 O.J. (L 338) art. 23(e)-(f); *see* STONE, *supra* note 168, at 474 ("[T]he Regulation accepts the inherent nature of custody orders, as being open to modification by reason of a subsequent change in circumstances.").

172. RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 119–22, 227, 278–79 (2008); Ginsburg, *supra* note 75, at 804 & n.33; *cf.* A GLOBAL LAW ON JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 305 (John J. Barceló III & Kevin M. Clermont eds., 2002) (setting out art. 28(1)(b) of the draft jurisdiction-and-judgments treaty, which more simply provided that recognition or enforcement may be refused if "the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognized or enforced in the State addressed").

173. *See* Mukarrum Ahmed, *Brexit and English Jurisdiction Agreements: The Post Referendum Legal Landscape*, http://ssrn.com/abstract=2839342 (Sept. 15, 2016) (discussing the impact of the EU exit on the laws of England); Andrew Dickinson, *Back to the Future—The UK's EU Exit and the Conflict of Laws*, http://ssrn.com/abstract=2786888 (May 31, 2016) (same).

The early cases in the United States were domestic cases involving the benefitee's failure to assert res judicata in F-2.[174] For these, last-in-time seemed the natural answer. Because of the expansiveness of American res judicata, the cases presenting inconsistent judgments multiplied and last-in-time became entrenched. Because America's devotion to res judicata meant that we should honor decisions about res judicata, last-in-time came to apply in situations where the benefitee asserted res judicata unsuccessfully in F-2.

Elsewhere in the world, the problem tended to present itself with obviousness in international cases, and parochialism defensibly led to a preference for any local judgment. A lesser devotion to res judicata led to a first-in-time rule when the time came to backfill a solution for the problem's rarer contexts. This solution could be leavened by notions of waiver, however, as achieved by cross-estoppel in England where a relatively broader res judicata has led to a more developed law on inconsistent judgments.

But perhaps the difference between the American solution and that of the rest of the world is not as stark as a first glance suggests. If the United States were not to apply its last-in-time rule sometimes when a foreign-nation judgment was involved, and if other countries would adopt the British notion of cross-estoppel, the difference between the United States and the rest of world would become not at all stark. Indeed, the difference would shrink to the realm of cases where F-1 and F-2 are both domestic and F-2 actually decided, rightly or wrongly, to reject the benefitee's assertion of res judicata based on F-1's judgment. There American law alone opts for the last-in-time rather than the first-in-time.

That small remaining difference is explainable by the driving force of the American ardor for res judicata. It leads us to apply preclusion even to determinations about res judicata. We give definitive credit to F-2's resolution of the res judicata effect of F-1's judgment, while the rest of the world does not. Here lies the true difference between the United States and the rest of the world. Because we accept F-2's decision on res judicata, we choose last-in-time as the background rule, and they choose first-in-time.

174. *See supra* II.B.1.

III. LIMITING THE RULE FOR FOREIGN-NATION JUDGMENTS

Say, first, Pierre of France sues Doug of New York in a New York court for a large installment of interest on a French-made loan, and he loses by a defense of release of the obligation to pay interest. So, second, for all interest that has by then fallen in arrears, Pierre sues Doug in France and wins after the French court refuses to recognize the New York judgment and finds no release. Naturally enough, third, Pierre sues Doug in New York upon the French judgment to enforce it where Doug's assets are, and also sues Doug upon the underlying claim for all interest due, but he encounters a fight over recognition. Doug invokes the first New York judgment. Pierre invokes the second judgment, even though it likely is not preclusive under French law on the finding of no-release,[175] to argue that the later French decision should prevail over the prior New York judgment.

This hypothetical emerged during a classroom discussion. It struck me then as a situation where the arguments for the last-in-time rule vaporized. The second judgment being nonpreclusive and foreign seemed to scream for New York to honor its own prior judgment. Now to support that intuitive outcome, I shall separately consider how the two features of F-2's judgment—it is nonpreclusive and it is foreign—together destroy the rationales for the last-in-time rule.

A. Nonpreclusive Judgments

The *Pierre v. Doug* hypothetical raises the question of what to do with the last-in-time judgment if it is nonpreclusive. A conceivable approach would be to say it "doth put the matter at large,"[176] the old expression meaning that no preclusion applies. The idea would be that the last-in-time judgment controls, and it says there is to be no preclusion. But no case takes that approach. Moreover, looking to F-2's nonpreclusion would undo the rationale

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175. Because these are different claims, and because French res judicata provides little in the way of collateral estoppel, the F-2 judgment would probably not be issue-preclusive in F-3 on the claim for interest. FIELD ET AL., *supra* note 27, at 886–88; PETER HERZOG & MARTHA WESER, CIVIL PROCEDURE IN FRANCE 554 n.18 (Hans Smit ed., 1967); Clermont, *supra* note 127, at 1096–98; Zeuner & Koch, *supra* note 142, §§ 9-70 to -76. As to defeating the action upon the French judgment, see *infra* note 215.

176. 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 667, at 352b (London, J. & W.T. Clarke, 19th ed. 1832) (1628).

for having some priority rule, namely, that one of the preceding judgments should be the final word. Therefore, if the last-in-time judgment is nonpreclusive, F-3 should look to the first-in-time judgment if it would be preclusive.

This rather obvious qualification is better handled as part of the rule rather than as an exception to the rule. Accordingly, Professor Ginsburg could begin her article with this sentence: "Under traditional res judicata doctrine, where there are conflicting judgments and *each would be entitled to preclusive effect if it stood alone*, the last in time controls in subsequent litigation."[177]

Indeed, without a preclusiveness requirement, the last-in-time rule would be far too broad. Many subsequent determinations could be inconsistent in some sense and would potentially undermine a judgment's res judicata effects widely. Thus, preclusiveness should enter into inconsistency's definition. That is, to be inconsistent means that the prior judgments would preclusively resolve the claim or issue differently in F-3. If F-1 or F-2 does not yield preclusion on the claim or issue, there is no inconsistency, and hence the last-in-time rule does not come into play. For example, a decision that did not get reduced to a judgment would not be considered inconsistent. Or a judgment that is not recognizable, valid, or final would not come down to F-3. Likewise, a decision in a forum with a res judicata law too narrow to preclude the claim or issue would not come down to F-3.

An illustration would be where Driver 1 sues Driver 2 for negligence and wins, establishing negligence and the absence of contributory negligence. Passenger next sues Drivers 1 and 2 for negligence in the same accident and wins, establishing negligence against both. Then Driver 1 sues Driver 2 for contribution on the second judgment based on comparative fault. Even though Driver 2 might be able invoke the second judgment against Driver 1 for some purposes,[178] that judgment did not decide their comparative fault. So, Driver 1 should be able to invoke the first judgment to establish Driver 2's sole fault.[179]

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177. Ginsburg, *supra* note 75, at 798 (emphasis added).

178. RESTATEMENT (SECOND) OF JUDGMENTS § 38 (AM. LAW INST. 1982).

179. *Cf.* Brightheart v. McKay, 420 F.2d 242, 244 (D.C. Cir. 1969) (suggesting this solution); Neenan v. Woodside Astoria Transp. Co., 184 N.E. 744, 745 (N.Y. 1933) (treating the different situation of pro rata contribution). The best counterargument is that the conflicting determinations call for relitigation, but that is not the usual route taken by our res judicata law. *See supra* notes 42–43.

An international example lies in *Ackerman v. Ackerman*.[180] First, the wife obtained a small New York judgment against the husband for failure to pay support.[181] Second, she sued the husband in California upon that judgment and for big amounts subsequently due, but her attorney mistakenly dismissed that action with prejudice.[182] Third, she sued in England for those subsequent amounts due, and the court rejected the California judgment and awarded her over a million dollars.[183] Fourth, she sued back in New York upon the English judgment, and the husband removed to the Southern District of New York on the basis of diversity.[184] The husband argued: "The English judgment . . . , not being that of a sister state, is not constitutionally entitled to full faith and credit, nor to superseding effect under the last-in-time rule."[185] The district court nevertheless applied the last-in-time rule, observing that the English court had proceeded impartially, sensitively, and soundly. The court of appeals ducked that "knotty question,"[186] and instead ruled that New York would look to California res judicata law under which the California judgment was not preclusive.[187] With the California case off the table, there were no inconsistent judgments and so the English judgment governed.[188]

Ackerman illustrates the important point that while we search for the proper formal rule, we cannot blind ourselves to legal realism. Both the district court and the court of appeals wanted to apply the English result. They differed only in how to manipulate the rules so as to get there. The widest route to manipulation is nonpreclusion. A court wishing to evade a prior determination would simply identify a defect in the prior judgment's recognizability, validity, finality, or bindingness, which is often doable thanks to those doctrines' complicatedness. So, where F-1 faces a decision from F-2 that disrespected F-1's prior judgment, F-1 might very well be able to ignore F-2's "nonpreclusive" judgment without openly flouting its duty to give full faith and credit.[189] This dose of realism thus drives

180. 676 F.2d 898 (2d Cir. 1982).
181. *Id.* at 899–900.
182. *Id.* at 900–01.
183. *Id.* at 901.
184. *Id.* at 901.
185. *Id.* at 903.
186. *Id.* at 902 n.5.
187. *Id.* at 905 (ruling that the wife had no meaningful opportunity to litigate in California).
188. *Id.*
189. *See, e.g.*, First Ala. Bank of Montgomery, N.A. v. Parsons Steel, Inc., 825 F.2d 1475 (11th Cir. 1987) (treating, on remand, the Alabama judgment as

home the significance of the formal rule's prerequisite of preclusiveness as a path to the desired result.

This subsection's detour into nonpreclusion allows us better to understand the last-in-time rule. The law in the United States is that the last judgment governs—when two prior judgments offer preclusion of a claim or issue but would preclude differently.[190] This detour is also an appropriate introduction to foreign-nation judgments because often the foreign judgment will be nonpreclusive under the foreign nation's narrow res judicata law, and thus not even qualify as an inconsistent judgment.

B. American v. Foreign Judgments

"One of the key problems facing international litigants is the possibility of irreconcilable judgments or proceedings arising out of parallel litigation."[191] How should American law address an inconsistent foreign-nation judgment?

Because our conflicts law developed in the interstate setting rather than the international setting, our law does not show an instinctive wariness of foreign-nation judgments. The last-in-time rule is well-established enough that American courts presume it to apply even to international litigation, at least when two inconsistent foreign-nation judgments arrive at an American court.[192] The rationales of the last-in-time rule carry over from the all-domestic setting to this all-foreign setting.

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non-final in a sequence of Middle District of Alabama, Alabama, and Middle District of Alabama); *cf., e.g.*, Herbstein v. Bruetman, 266 B.R. 676, 686 (N.D. Ill. 2001) (treating, on appeal, the Argentine judgment as non-final in a sequence of Southern District of New York, Argentina, and Northern District of Illinois), *aff'd*, 32 F. App'x 158 (7th Cir.), *cert. denied*, 537 U.S. 878 (2002).

190. *See, e.g.*, United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925) (looking to F-1 in a sequence of divorce for adultery; nonappealable, nonreviewable, and hence nonpreclusive state naturalization proceeding approving morality; and federal cancellation of naturalization for immorality); Deere & Co. v. First Nat'l Bank of Clarksdale, 12 So. 3d 516, 522 (Miss. 2009) ("We begin by pointing out the obvious: The 'last-in-time' rule applies only where res judicata could have applied."); Algazy v. Algazy, 135 N.Y.S.2d 123 (Sup. Ct. 1954) (disregarding F-2 and F-3 judgments in fourfold sequence of Nevada divorce, Romanian decree without jurisdiction, French decree without finality, and New York action), *aff'd mem.*, 142 N.Y.S.2d 365 (App. Div. 1955).

191. S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 117 (2014).

192. *See, e.g.*, Ambatielos v. Found. Co., 116 N.Y.S.2d 641 (Sup. Ct. 1952) (involving a sequence of contract actions in England, Greece, England, and New York).

Of course, the compulsion to follow the last-in-time rule lessens as we move from full faith and credit into the realm of comity.[193] The American court can consider local interests and policies in the context of special circumstances.[194] Thus, the last-in-time rule might presumptively apply,[195] but the American court can reject the F-2 judgment if F-1's judgment is clearly preferable.[196]

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193. *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."). *See generally* Christopher R. Drahozal, *Some Observations on the Economics of Comity*, *in* ECONOMIC ANALYSIS OF INTERNATIONAL LAW 147 (Thomas Eger et al. eds., 2014); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

194. Chromalloy Aeroservs., a Div. of Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt, 939 F. Supp. 907, 913 (D.D.C. 1996) (involving arbitration):

> "No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). "[C]omity *never* obligates a national forum to ignore 'the rights of its own citizens or of other persons who are under the protection of its laws.'" *Id.* at 942 (emphasis added) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S. Ct. 139, 143–44, 40 L. Ed. 95 (1895)[)]. Egypt alleges that, "Comity is the chief doctrine of international law *requiring* U.S. courts to respect the decisions of competent foreign tribunals." However, comity does not and may not have the preclusive effect upon U.S. law that Egypt wishes this Court to create for it.

195. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(e) cmt. g (AM. LAW INST. 1987) ("Courts are likely to recognize the later of two inconsistent foreign judgments, but under Subsection (2)(e) the court may recognize the earlier judgment or neither of them."); Courtland H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 256–57 (1972) (discussing the failure of the Restatement (Second) of Conflict of Laws to clarify this issue).

196. *Cf.* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5(c)(ii) (AM. LAW INST. 2006). This provision says that F-3 need not recognize a foreign judgment if "the judgment is irreconcilable with another foreign judgment entitled to recognition or enforcement under the Act and involving the same parties." The pertinent comment explains that the F-3 court "should inquire into the circumstances giving rise to the inconsistency" and usually should recognize the F-2 judgment only if the F-2 court had "considered the other judgment or proceeding and declined to recognize it under standards substantially comparable to the standards set forth in

"Clearly" serves the purpose of enhancing predictability. "Preferable" will turn most heavily on how disrespectfully F-2 considered F-1's judgment.

Accordingly, the highly influential Uniform Act on recognition provides that a foreign-nation judgment *need not* be recognized or enforced if "the judgment conflicts with another final and conclusive judgment."[197] If F-3 does not recognize an F-2 judgment under the Act, then F-3 would look to the F-1 judgment. This provision thus handles two inconsistent foreign-nation judgments arriving at an American court.

What if, of the two inconsistent judgments, the first is American and the second is foreign?[198] Certainly, the flexibility of comity allows F-3 to disregard the foreign F-2. But the inclination might still persist to apply the last-in-time rule presumptively in favor of the foreign-nation judgment.[199] I shall show that the inclination here is misplaced.

One could indeed argue over whether F-3 must disregard the F-2 judgment in favor of an otherwise preclusive American judgment

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this Act." *Id.* cmt. j; *see* Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 713–16 (2d Cir. 1987) (looking to F-1, under federal and state law, in sequence of Sweden, England, and Southern District of New York, when F-2 had disregarded F-1's bankruptcy proceeding); *cf.* Films by Jove, Inc. v. Berov, 250 F. Supp. 2d 156, 164–66, 175–77 (E.D.N.Y. 2003) (looking to F-1, under federal law, in sequence of France, France, and Eastern District of New York, when F-2's "interpretation is contradicted by an earlier ruling of the same court, upheld by the court of last resort, in a suit involving the same parties and identical legal issues, and, more significantly, when the interpretation appears very obviously mistaken based on the more probative evidence of Russian law furnished to this court by plaintiffs' experts"), *motion to vacate denied*, 341 F. Supp. 2d 199 (E.D.N.Y. 2004).

197. UNIF. FOREIGN–COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(4) (2005), 13 (pt. II) U.L.A. 28 (Supp. 2015); *see* UNIF. FOREIGN MONEY–JUDGMENTS RECOGNITION ACT § 4(b)(4) (1962), 13 (pt. II) U.L.A. 59 (2002) (same); Byblos Bank Eur., S.A. v. Sekerbank Turk Anonym Syrketi, 885 N.E.2d 191, 192 (N.Y. 2008) (looking to F-1 in sequence of Turkey, Belgium, and New York, when F-2 had exercised *révision au fond* and found the Turkish judgment to be "affected by substantial error").

198. If the first judgment is foreign and the second is American, the last-in-time rule gives the desirable result. *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 132 P.2d 70 (Cal. Dist. Ct. App. 1942) (involving a sequence of ownership actions in the Philippines, New York, and California). But that right result derives less from the reasons for respecting the last judgment, and rather more from the reasons for preferring the local judgment over the foreign judgment.

199. *See* Perkins v. DeWitt, 111 N.Y.S.2d 752 (App. Div. 1952) (looking tentatively to the latest Philippine judgment in a sequence of ownership actions in the Philippines, New York, Philippines, and New York), *rev'g* 94 N.Y.S.2d 177 (Sup. Ct. 1950).

from F-1. This is *Ackerman*'s "knotty question."[200] This question of mandatoriness remains an open one, but I shall argue in support of mandatoriness.

As we have seen, the American Law Institute at first punted on the application of last-in-time to international litigation.[201] Then, in the Restatement (Third) of Foreign Relations Law, the ALI expressly adopted the discretionary approach of the Uniform Act,[202] thereafter attracting some case support.[203] Now, in its proposed statute on recognition, the ALI has extended the Uniform Act's approach, by providing, without case citation and only in a comment to its proposed statute, that F-3 *must not* respect a foreign-nation judgment over an American judgment:

> If recognition or enforcement of a foreign judgment is sought in a court in the United States and the judgment is asserted to be irreconcilable with a judgment rendered by a court in the United States, the court in the United States is obligated to recognize the judgment rendered in the United States and deny

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200. *See supra* text accompanying note 186.

201. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 cmt. d (AM. LAW INST. 1971) ("It is uncertain whether the rule of this Section will be applied to judgments rendered in a foreign nation."); *supra* text accompanying note 96.

202. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2) (AM. LAW INST. 1987) ("A court in the United States need not recognize a judgment of the court of a foreign state if . . . (e) the judgment conflicts with another final judgment that is entitled to recognition . . . ."). The pertinent comment went on to say: "If a later foreign judgment otherwise entitled to recognition in a court in the United States conflicts with an earlier sister-State judgment, there is no principle requiring automatic preference for the sister-State judgment." *Id.* cmt. g. But its only support was the lower-court opinion in *Ackerman*. *See id.* reporters' note 4. There was no section comparable to § 482 in the previous Restatement of Foreign Relations Law, and the new § 482(2)(e) prompted no debate other than on comment g. *See* 60 A.L.I. PROC. 508 (1983) (Prof. Charles Alan Wright) ("But as between a judgment of a sister State and a foreign judgment, I would think there would be not the slightest doubt you have to follow, you are constitutionally compelled to follow, the judgment of other State and to disregard the later judgment of the foreign court.").

203. *See, e.g.*, Derr v. Swarek, 766 F.3d 430, 437 n.4 (5th Cir. 2014) (citing the Restatement provision in a footnote); *In re* Bruetman, 259 B.R. 649, 672 (Bankr. N.D. Ill.) (observing, in a sequence of Southern District of New York, Argentina, and Northern District of Illinois: "Indeed, parties who litigate to a conclusion in a United States court can hardly expect any United States court to give effect to a subsequent contrary ruling by a foreign court, and that should not be done here."), *aff'd sub nom.* Herbstein v. Bruetman, 266 B.R. 676, 686 (N.D. Ill. 2001) (treating the Argentine judgment as nonfinal), *aff'd*, 32 F. App'x 158 (7th Cir.), *cert. denied*, 537 U.S. 878 (2002).

> recognition or enforcement to the foreign judgment. This obligation, derived from the command of the Full Faith and Credit Clause of the U.S. Constitution and the implementing legislation, is applicable regardless of whether the foreign action or the action in the United States was commenced first and regardless of which judgment was first entered.[204]

In other words, the ALI finally approved the approach followed in the rest of the world's countries to favor their own judgments. American courts would be wise to get on this bandwagon. The rest of the countries may know what they are doing here. There may even be a value in applying the same rule as other countries do for local-foreign inconsistencies. In any event, the rationales for the last-in-time rule do not carry over to this setting, and so the balance of policies tips to a first-in-time rule. If America were to get on the bandwagon, we would operate under the scheme summarized in the following table:

Treatment of Inconsistent Judgments by American F-3		
F-1	*F-2*	*Rule*
American	American	Last-in-Time
Foreign-Nation	American	Last-in-Time
Foreign-Nation	Foreign-Nation	Presumptively Last-in-Time
American	Foreign-Nation	First-in-Time

First, for the table's last row, the rationale of waiver weakens considerably when F-2 is a foreign-nation court. Although we have come to accept the last-in-time rule's forcing attendance in an

204. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5(c)(ii) cmt. j (AM. LAW INST. 2006). The early drafts provided in blackletter that an American court *need not* recognize a foreign-nation judgment irreconcilable with an American judgment, but the comment said instead that it *must not*. *E.g.*, *id.* § 5(b)(ii) cmt. i (AM. LAW INST. Preliminary Draft No. 1, 2001). In response to arguments made at an annual meeting, 81 A.L.I. PROC. 292–94 (2004) (Prof. Mary Coombs & Mr. Michael Marks Cohen), the reference to American judgments dropped out of the blackletter, leaving just the comment. *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE reporters' memorandum, at xviii (AM. LAW INST. Proposed Final Draft, 2005) (noting that the section was restructured to address the issue).

American F-2, we should be wary of increasing the compulsion on someone, who has won in the United States, to show up in the foreign-nation forum. We should also be wary of compelling someone, who has shown up abroad, to make what they may view as a hopeless contention that the foreign court should give res judicata effect to a prior American judgment. Indeed, it is puzzling how to contend that failure to argue preclusion under foreign law somehow constitutes waiver of the full faith and credit argument.

Second, an even more powerful point is that the preclusion rationale drops out altogether. If F-2 were within the full faith and credit circle, the binding effect of F-1's judgment would be the same question whether it is faced by F-2 or by F-3. But the res judicata question faced by a foreign-nation F-2 is a different question (should it, under the foreign law, recognize the American F-1 judgment?) from the one faced by an American F-3 (would it, under American full faith and credit, recognize the American F-1 judgment?). Thus F-2's res judicata decision should have little or no preclusive effect in F-3 (even making the unlikely assumption that a foreign nation would give issue preclusion to its own determinations about res judicata). Moreover, even if F-2 was wrong under F-2 law in denying res judicata to F-1's judgment, there was no possibility of getting a supranational court to correct the denial of preclusion.

Third, it is difficult to believe that looking at the later judgment is somehow simpler. If F-3 were instead to look to F-1's judgment, it could avoid the question of recognizability of a foreign-nation judgment and the task of testing the F-2 judgment's validity, finality, and preclusion under foreign law. It should on average reduce the litigatory load to look to the American judgment rather than the foreign-nation judgment.

Fourth, it is hard to work up enthusiasm for the proposition that the foreign-nation judgment is, on average, likely more correct or otherwise more acceptable than the prior American judgment. The foreign-nation court probably used different choice-of-law and substantive doctrines, and employed procedures that probably would not appeal to us, to come to an inconsistent decision. It is not being parochial to presume that F-1 produced a decision as likely reliable as F-2's.

Fifth, going beyond the rationales, independent arguments against the last-in-time rule exist in this context. Honoring the last-in-time would be an invitation to forum-shopping among foreign-nation courts by the F-1 loser, who could either sue abroad on the claim or seek an injunction or declaratory judgment of nonliability. A last-in-time rule would result in "judgment scrubbing," whereby a

compliant foreign-nation court could erase the effects of a loss in the United States.[205] By contrast, domestic forum-shopping is not such a concern, because full faith and credit stands as a defense to shopping.

Sixth, one purpose of the conflict of laws doctrine is to enhance the coherence of the country's legal system.[206] In this situation of conflicting local and foreign judgments, it is not coherent to treat the judgments as equals. The suggestion here is not for blind adherence to the American judgment. The suggestion is that a valid and final American judgment was originally entitled to a certain respect in American courts, and that the intervening foreign-nation judgment had no authority to defeat that respect. Nor was the foreign nation's decision on recognition even focused on that respect. To repeat, the foreign-nation court is operating under a different recognition regime. The foreign-nation judgment was not deciding the respect owed in America, but only respect under the foreign law. In any event, the American F-3 should feel little motivation to honor the judgment of a foreign nation that has refused to honor an American judgment, as they often do.[207]

Seventh, there is no case law standing in the way of the United States adopting a rule of local preference. A tricky illustration of the closest precedents lies in *Derr v. Swarek*.[208]

The first judgment in *Derr* came by voluntary dismissal with prejudice of a Mississippi action by the purchasers of Mississippi farmland against the German sellers.[209] Even though under Mississippi res judicata law the purchasers' claim was extinguished, the second judgment came in a suit by the sellers in a German court, which rejected res judicata to reach the merits of the contract dispute, granted the sellers a declaratory judgment of nonliability, and assessed nearly $300,000 in court costs against the purchasers.[210] For the third action, the sellers resorted to the Southern District of Mississippi to enforce the German judgment for costs.[211]

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205. The allusion is to the "judgment laundering" practice of getting a compliant court to convert a shaky foreign judgment into an unassailable domestic judgment. CLERMONT, *supra* note 23, at 436–37.

206. *See* Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 724, 734–35 (1957) (discussing the view that "the essential objective is to co-ordinate the incidence of legal systems in conflicts cases").

207. Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 227–31 (2008).

208. 766 F.3d 430 (5th Cir. 2014) (2–1 decision).

209. *Id.* at 435.

210. *Id.*

211. *Id.*

The *Derr* federal district court rejected the German judgment, and the court of appeals affirmed. "Because federal jurisdiction was invoked by way of diversity of citizenship, we apply Mississippi law governing the recognition of foreign judgments."[212] In the federal court of appeals' view, the German court's failure to respect the purchasers' dismissal with prejudice of their claims against the sellers violated Mississippi public policy and rendered meaningless the right of the purchasers to put an end to litigation of their claims. "As the German declaratory judgment and attendant cost award issued only because the German court ignored the res judicata effect of the . . . dismissal with prejudice, the district court did not abuse its discretion in refusing to extend comity to the judgment."[213]

The *Derr* facts seem to suggest a slight complication.[214] In one sense, the judgments were consistent, as the purchasers had lost in both F-1 and F-2.[215] But Germany would have decided differently if it had given the American judgment its claim-preclusive effect. How then can we refine the rule to empower Mississippi to look at Mississippi's prior judgment? We need to include this kind of case—when F-3 wants to look at F-1's judgment to knock out an action upon F-2's judgment—within the problem of inconsistency. Inconsistent judgments have to be made to include the situation where enforcing F-2's judgment in F-3 would defeat the claim preclusive-effect that F-1's judgment would have under its own res judicata law.

The *Derr* federal courts viewed the denial of recognition to the German judgment as a discretionary decision under Mississippi's comity-based state law.[216] They could go the Mississippi way because the case's facts of Mississippi (F-1), Germany (F-2), and Mississippi (F-3) put it outside the reach of any federal compulsion. In any event, because the federal district court had exercised its

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212. *Id.* at 436.

213. *Id.* at 437.

214. This complication is an additional argument against applying the first-in-time rule broadly. *See supra* text accompanying note 36. The last-in-time rule more simply sidesteps the complication in all but this foreign-nation judgment situation. *See supra* text accompanying note 10.

215. The *Pierre v. Doug* hypothetical presents the same complication. *See supra* text accompanying note 175. The first New York judgment and the French judgment are not inconsistent in all senses, as the New York judgment technically could not be used for preclusion in the later action upon the French judgment in F-3. But the New York judgment should have claim-precluded the French action, and so F-3 would want to escape the last-in-time rule.

216. *See* Derr, 766 F.3d at 442, 446 (noting that Mississippi has not enacted the Uniform Act, but it follows the usual public-policy exception to comity).

discretion against the German judgment, the court of appeals did not have to decide whether the district court was obliged to disregard the German judgment, under Mississippi or federal law.[217]

The ALI believes that the general American law should make mandatory the denial of recognition to the foreign-nation judgment.[218] In my view too, based on the reasons above, an American court must disregard a foreign-nation judgment inconsistent with an American judgment. Whether the foreign-nation court just ignored the American judgment, correctly rejected it under the foreign law, or erroneously denied respect under the foreign law, the American court should look to the American judgment. If the foreign country was trying to respect the American judgment but erroneously interpreted American law, that is a tougher call on which there is no case guidance. Because the line between naked disrespect and honest mistake could be rather fine and because many of the arguments for letting the local judgment control still apply, I would persist in saying the American court must disregard such a foreign-nation judgment. If, however, the foreign-nation court were, someday, to become mutually obligated by treaty to give the equivalent of full faith and credit to an American judgment, the balance would tip back to the last-in-time rule.[219]

The ALI simply attributed the mandatory preference for the local judgment to the Full Faith and Credit Clause and Act. I was less certain that these provisions address this point. No case has squarely addressed the point, because the court can duck it by disregarding the foreign judgment "in its discretion" as the *Derr* courts did. When the issue finally arises, I do think that an American court should hold that the preference is mandatory, at least as a matter of federal common law. Although the Uniform Act and some other state laws leave the preference for the local judgment discretionary, the

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217. The same issues are currently on appeal in the Fourth Circuit. The sequence of cases there was District of Maryland, Iraq, District of Maryland. The federal cases were in diversity, and Maryland is a Uniform Act state. *See* Iraq Middle Mkt. Dev. Found. v. Harmoosh, No. 15-CV-01124, 2016 WL 1242598, at *8–9 & n.9 (D. Md. Mar. 30, 2016) (rejecting Iraqi judgment on another ground), *appeal filed*, No. 16-1403 (4th Cir. Filed Apr. 11, 2016).

218. *See supra* text accompanying note 204.

219. An argument against constitutionalizing the preference for an American judgment would be that it might hamper our ability to enter into such treaties. *See generally* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 124–27 (1999) (discussing similar constitutional issues in the context of jurisdiction). But recall that U.S. CONST. art. IV, § 1 authorizes congressional exceptions to full faith and credit. The implementing legislation could adjust the preference for local judgments.

mandatoriness of the federal law would override it when that federal law was applicable interjurisdictionally. If F-2 is a foreign nation and F-1 and F-3 are the same U.S. state, then state law would govern.

Nonetheless, I ultimately believe that the ALI was right that mandatoriness flows from the Full Faith and Credit Clause and Act. The way they work is to require that an American court give full faith and credit to an American judgment, subject only to narrow exceptions expressly provided by statute or by rare court decision based on a national policy.[220] In the situation under consideration, there is only one prior American judgment, and no statute or strong policy calls for an exception in favor of a last-in-time foreign judgment, so the Clause and Act impose a first-in-time rule.

CONCLUSION

The current American law on inconsistent judgments enshrines the last-in-time rule, despite the fact that it is out of step with the rest of the world's devotion to a broadly applicable first-in-time rule. Although America's law is a bit imprecise, not even defining the idea of "inconsistent" judgments, it shows lack of complete conviction only when the last-in-time judgment loser could not get review in the U.S. Supreme Court or when a prior domestic judgment goes toe-to-toe with a subsequent foreign-nation judgment. It is high time to refine the imprecisions and to resolve the uncertainties.

To do so, this Article proposes the following "blackletter" formulation:[221]

> **INCONSISTENT JUDGMENTS: When two (or more) prior judgments would preclude a claim or issue differently in a subsequent action, the last-in-time of the prior judgments will be recognized as controlling on the claim or issue.**
>
> **If, however, both judgments come from foreign nations, the flexibility of comity means the last-in-**

220. *See* CLERMONT, *supra* note 23, at 429–31 (discussing rule of full faith and credit under "state-state" and "state-federal" situations).

221. *See* Kasia Solon Cristobal, *From Law in* ***Blackletter*** *to "Blackletter Law,"* 108 LAW LIBR. J. 181 (2016) (tracing the history of this phrase's meaning from the off-putting use in law of very black Gothic type to the concise statement of the basic principles of a legal subject).

> **time judgment need not be recognized as controlling in circumstances that make the first-in-time resolution appear clearly preferable.**
>
> **Moreover, in an inconsistency between an American judgment and a foreign-nation judgment, including where enforcing the foreign-nation judgment would defeat the claim-preclusive effect that the American judgment would have under its own res judicata law, the foreign-nation judgment will not be recognized as controlling on the claim or issue.**

This formulation realizes the slight advantages of a last-in-time approach, while recognizing needed exceptions for treating foreign-nation judgments. Additionally, it accords with the American cases, intelligently reread, a case law position to which a goodly number of Supreme Court cases have pretty much committed us. Finally, given American law's current exception for foreign-nation judgments, and recalling the incipient acceptance abroad of waiver as an exception to their first-in-time rule, it turns out that America and the rest of the world are not so far apart in the treatment of inconsistent judgments after all. The consequential irony is that comparative law, which prompted my questioning of American law, ultimately reveals convergence and so provides support for the proposed reformulation.