

# THE IRON LAW OF FULL FAITH AND CREDIT

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## INTRODUCTION

The usual purpose of litigation is to obtain a valid judgment, that is, a judgment leading to effective relief.<sup>1</sup> Normally, in order to be valid, a judgment need only be a “final” judgment issued by the trial court. Armed with a valid judgment, the successful plaintiff who was awarded damages can begin executing on the defendant’s assets. When those assets are located in another jurisdiction, however, things become more complicated. Plaintiff must enlist the aid of authorities located in that jurisdiction to obtain relief, a process that defendant often will resist by making a collateral attack on the judgment. Because collateral attacks on judgments occur frequently, the rules governing the availability of enforcement in a foreign jurisdiction should be well understood. Many lawyers, and some academics, however, do not seem to grasp fully the rules concerning sister-state enforcement and collateral attack. This Article explores the basic rule of sister-state enforcement and its limited exceptions.<sup>2</sup> This basic rule is so clear and strong that it might be called the “Iron Law” of Full Faith and Credit.

The Iron Law is predicated on the express design of the Framers that “Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State.”<sup>3</sup> The purpose of the Full Faith and Credit Clause can be inferred from

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1. Effective relief is the goal of most litigation. Some litigation, of course, is brought for other purposes, such as to harass (for example, the strike suit), or to obtain psychic fulfillment (as any divorce lawyer will agree).

2. This Article does not address the enforcement of judgments in another nation. For a general discussion of international recognition of judgments, see EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* §§ 24.33-24.45 (1992). This Article also does not address the actual methods of enforcing judgments in other states.

3. U.S. CONST. art. IV, § 1.

both its wording and its location within Article IV. Based upon its language and location, it is clear that the Full Faith and Credit Clause imposed mandatory comity on the states<sup>4</sup> in the hope that treating the judicial proceedings of other states with appropriate deference would lessen friction among the states in the new and fragile union.<sup>5</sup>

The Supreme Court has held that the Full Faith and Credit Clause demands rigorous obedience.<sup>6</sup> Nevertheless, there are some exceptions to the absolute rule of Full Faith and Credit. The first part of this Article explores the source of the Supreme Court's mandate. The Article next examines the two main types of exceptions to the rule of absolute Full Faith and Credit. First it examines those exceptions involving problems with the decree itself. Then it examines those exceptions that may permit an enforcing state to deny credit to a valid decree. The Article concludes with a discussion of public policy in the judgment enforcement process.

### I. THE IRON LAW OF FULL FAITH AND CREDIT

If a court in state "F-1" renders a final judgment in a case over which it possesses both personal and subject matter jurisdiction, its judgment is entitled to full faith and credit in state "F-2," even if that judgment is based on a mistake of fact or law.<sup>7</sup> If the losing litigant wants to correct the error, the litigant must do so in F-1's courts, either on appeal or through some other type of direct attack.<sup>8</sup> Once the judgment is final according to the law of F-1, however, the Full Faith and Credit Clause prohibits collateral attack in F-2.<sup>9</sup> This is the Iron Law of Full Faith and Credit.

This principle was strikingly articulated in *Fauntleroy v. Lum*.<sup>10</sup> In *Fauntleroy*, plaintiff and defendant, both residents of Mississippi, entered into a "futures" commodities contract, which was illegal as a form of gambling according to Mississippi law.<sup>11</sup> The parties

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4. See *id.* (stating that full faith and credit shall be given in each state).

5. Article IV includes several other clauses, such as the Extradition Clause and the Privileges and Immunities Clause, which also are designed to alleviate friction among the states. See *id.* § 2. For a good general explanation of the history of the Full Faith and Credit Clause, see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

6. See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

7. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 106 (1969).

8. See, e.g., FED. R. CIV. P. 60(b). For example, direct attack may be made in the form of a motion to vacate or a motion for relief from judgment.

9. See *infra* note 16 and accompanying text.

10. 210 U.S. 230 (1908).

11. *Id.* at 234.

disputed the effect of the contract and submitted their differences to an arbitrator, who made an award to plaintiff.<sup>12</sup> Plaintiff then sued defendant in a Mississippi court to recover on the award.<sup>13</sup> When the Mississippi court became aware of the illegality of the contract, plaintiff dismissed the case and later sued defendant in Missouri. The Missouri court rejected defendant's evidence on the illegality issue and rendered judgment for the plaintiff based on the arbitrator's award.<sup>14</sup> When plaintiff sought enforcement of the Missouri judgment in Mississippi, the Mississippi Supreme Court refused to grant the judgment full faith and credit because the futures contract was unenforceable under Mississippi law.<sup>15</sup> The Supreme Court of the United States reversed and stated emphatically that "[a] judgment is conclusive as to all the *media concludendi*; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law."<sup>16</sup>

The Court scarcely could have picked a more striking case to illustrate the basic principle of sister-state enforcement. Not only did the Missouri court err, but it erred on a question of Mississippi law and thereby frustrated an important social policy of Mississippi. As the Mississippi Supreme Court stated, "If this be law, all that is necessary to free the most corrupt transaction from all objection is to obtain service on a party, and get judgment in another state . . . ."<sup>17</sup> Nevertheless, the Supreme Court held that the Missouri judgment was entitled to full faith and credit in Mississippi—the very state whose policy was being thwarted.<sup>18</sup> As *Fauntleroy* clearly indicates, the Full Faith and Credit Clause requires that the doctrines of repose and

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12. *Id.* at 233-34.

13. *Id.* at 234.

14. *Id.*

15. *Id.*

16. *Id.* at 237 (citation omitted). The *Fauntleroy* majority thought that its rule could be traced to Chief Justice Marshall's pronouncement in *Hampton v. McConnell*, 16 U.S. (3 Wheat.) 232 (1818), that

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

*Id.* at 234.

A four-Justice dissent in *Fauntleroy* concluded that "[t]he ancient maxims that something cannot be made out of nothing, and that which is void for reasons of public policy cannot be made valid by confirmation or acquiescence, seem to my mind decisive." *Fauntleroy*, 210 U.S. at 246 (White, J., dissenting).

17. *Lum v. Fauntleroy*, 32 So. 290, 291 (Miss. 1902).

18. *Fauntleroy*, 210 U.S. at 237.

finality be given interstate effect.<sup>19</sup>

*Fauntleroy* also illustrates nicely the "One Bite" corollary to the Iron Law. The "One Bite" corollary basically provides that a litigant is entitled to one, and only one, "bite" of the litigation "apple." After the litigant has taken that bite, the Full Faith and Credit Clause precludes the litigant from trying another apple to see if it tastes better.<sup>20</sup>

## II. INCONSISTENT JUDGMENTS

Although the requirement that a court give full faith and credit to other states' judgments is strong, it is not absolute. For example, a judgment need not be given preclusive effect if the rendering court lacked personal jurisdiction over the defendant.<sup>21</sup> If F-2 refuses to give full faith and credit to F-1's judgment because F-1 lacked personal jurisdiction, and F-2 later reaches a different outcome on the merits, inconsistent judgments will result. In such a situation, the question becomes: which of those judgments is entitled to full faith and credit in a later action?<sup>22</sup>

That was the issue in the famous Supreme Court case of *Treinies v. Sunshine Mining Co.*<sup>23</sup> *Treinies* involved a dispute between a man and his stepdaughter concerning the ownership of mining stock. A Washington state court first held for the stepfather.<sup>24</sup> When the stepfather introduced that decree in a suit in Idaho between the same parties, the Idaho court refused to grant full faith and credit to the Washington judgment on the grounds that the Washington court lacked subject matter jurisdiction; the Idaho court then entered a decree for the stepdaughter.<sup>25</sup> When the stepfather sued in Washington to quiet title to the stock, the mining company filed a bill of interpleader seeking to ascertain the ownership of the stock.<sup>26</sup> That

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19. *See id.*

20. *See id.* In addition, a litigant who waits too long to take a bite may be estopped under the default judgment rule of taking a bite at all.

21. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 104-105 (1969). *But see infra* text accompanying notes 75-113 (noting that collateral attack on a judgment for lack of personal or subject matter jurisdiction is limited to situations in which that issue was not litigated in F-1).

22. *See generally* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969) (noting that the last-in-time rule is a means by which to choose which of two or more inconsistent judgments is entitled to full faith and credit).

23. 308 U.S. 66 (1939).

24. *Id.* at 68.

25. *Id.*

26. *Id.*

action eventually reached the Supreme Court, which held that the Idaho judgment was entitled to enforcement.<sup>27</sup> The Court adopted a "last-in-time" rule, which means that the latest to occur of two or more inconsistent judgments is the one that must be given full faith and credit.<sup>28</sup>

One advantage of the *Treinies* rule is that it generally simplifies the task of judicial administration. If a third court (F-3), for example, is asked to enforce the F-2 judgment in a case involving inconsistent valid judgments, F-3 need only inquire into whether F-2 had proper jurisdiction. So long as F-2 had jurisdiction and its judgment is later in time than F-1's, the F-2 judgment must be enforced. Thus, F-3 is spared from choosing between the F-1 and F-2 decisions in terms of "rightness" when both are technically valid.<sup>29</sup>

The *Treinies* rule also fits well in the conceptual scheme of full faith and credit. If F-2 wrongly refuses to give full faith and credit to an F-1 judgment, it has committed an error of law and has issued an erroneous judgment. Wrong judgments, according to the basic rule of *Fauntleroy*, nevertheless are entitled to full faith and credit.<sup>30</sup> Correction of the erroneous judgment must occur by direct challenge or appeal in F-2, therefore, not by collateral attack in F-1 or elsewhere.

A possible problem with the *Treinies* rule is that it might permit F-2 to ignore its constitutional obligation to respect F-1 judgments. Of course, in our federal system, proper adherence to the mandate of the Full Faith and Credit Clause is a federal question, and correction of error always is possible through appeal to the Supreme Court.<sup>31</sup> Given the Court's workload,<sup>32</sup> however, and the large

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27. *Id.* at 78.

28. *See id.*; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (1969); RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1980) (noting that parties should be bound by the later judgment so long as it remains unreversed).

29. This Article does not address the questions that arise when F-2 enjoins an action in F-1. At present, the injunction may issue but the Supreme Court has not required that such an order be obeyed in F-1. *See generally* Ginsburg, *supra* note 22, at 823-30.

30. *See Fauntleroy*, 210 U.S. at 237.

31. *See Treinies*, 308 U.S. at 77 (noting that the stepfather's failure to petition for certiorari from a final Idaho decree precluded relitigating the question).

32. *See* DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS 609 n.3 (1990) (discussing the workload problem); *see also* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) ("One might argue that this Court's appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions. . . .

However, . . . having served on this Court for 30 years, it is clear to me that, realistically, it cannot even come close to 'doing the whole job' . . .").

number of state cases involving full faith and credit, effective review by certiorari is really a forlorn hope.<sup>33</sup> The real reason why the *Treinies* rule is not a major cause for concern is that there is little evidence today of the sort of parochialism that would cause state courts to ignore systematically the constitutional mandate of full faith and credit.

Although the last-in-time rule is easily understood, a problem arises in its application when F-3 is also F-1—when, in other words, the later F-2 decree is taken back to F-1 to be enforced. *Treinies* demands that F-1 give full faith and credit to the F-2 decree, a result that several state courts have resisted.<sup>34</sup> The Supreme Court, however, has indicated strongly that refusal to give full faith and credit to the latter judgment is improper.<sup>35</sup>

### III. EXCEPTIONS TO THE IRON LAW I—PROBLEMS WITH THE F-1 DECREE: THE RULE OF RECIPROCITY

There is a corollary to the Iron Law of Full Faith and Credit that might be called the Rule of Reciprocity. The Full Faith and Credit Clause requires that each state accord a judgment of another state as much respect and credit as it would receive in the rendering state.<sup>36</sup> A judgment that does not have preclusive effect in F-1, therefore, need not be given preclusive effect by F-2. This Rule of Reciprocity follows naturally from the purpose animating *Fauntleroy*; namely, that our federal system does not require an enforcing state to give a

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33. *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114, cmt. b (1969) (noting that it may be inappropriate to give conclusive effect to a second judgment when the Supreme Court has denied review of that judgment).

34. *See, e.g.,* Porter v. Porter, 416 P.2d 564, 568 (Ariz. 1966) (refusing to grant full faith and credit to an Idaho judgment because the Idaho court had refused to give a prior Arizona judgment full faith and credit), *cert. denied*, 386 U.S. 957 (1967); Kessler v. Fauquier Nat'l Bank, 81 S.E.2d 440, 444-45 (Va. 1954) (refusing to grant full faith and credit to a decree issued by a Florida court to the effect that a former Florida-issued divorce decree was null and void, on the grounds that Virginia, which had based its decision on the first Florida decree, was not required to reverse its adjudication simply to give effect to a new Florida decree).

35. *See* Sutton v. Leib, 342 U.S. 402, 406-07 (1952) (noting in dicta that a state must give full faith and credit to a judgment rendered in another state and sought to be enforced in its state); *see also* Ginsburg, *supra* note 22, at 806-11. *But see* Colby v. Colby, 369 P.2d 1019 (Nev.) (recognizing an earlier Nevada divorce decree that a Maryland court had declared invalid), *cert. denied*, 371 U.S. 888 (1962). This *Colby* decision is, of course, clearly wrong under the Iron Law. *See Fauntleroy*, 210 U.S. at 237.

36. *See supra* text accompanying notes 7-20.

judgment any *more* authority than it would receive in the rendering state.<sup>37</sup>

### A. *Judgments Not on the Merits*

Judgments not on the merits make up one large class of judgments that lack claim-preclusive effect.<sup>38</sup> What is meant by a “judgment not on the merits” differs, of course, from state to state. Nevertheless, several general observations can be made. A judgment typically is said to be on the merits when it rests upon a determination of the validity of the parties’ claims and defenses under the applicable substantive law, rather than on some technical procedural ground.<sup>39</sup> In nearly all jurisdictions, there are certain classes of judgments that are *not* considered judgments on the merits. Examples of judgments not on the merits include those based on lack of subject matter jurisdiction, lack of jurisdiction over persons or property, improper venue, or misjoinder or nonjoinder of parties.<sup>40</sup> Such judgments indicate only that plaintiff chose to sue in the wrong court or to sue the wrong parties. These judgments say nothing about the substantive validity of plaintiff’s case. Hence, a decision against plaintiff based on “procedural grounds” in F-1 should not prevent plaintiff from raising the “substantive” issues again in F-2. Similarly, a dismissal by F-1 on the ground that plaintiff’s case is time-barred does not reach the merits of plaintiff’s case. Plaintiff, therefore, usually may sue in F-2 on the same cause of action if the claim is not barred in that jurisdiction as well.<sup>41</sup>

An F-1 judgment that produces more ambiguity, however, is one based upon a demurrer or motion to dismiss for failure to state a

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37. See generally WILLIAM RICHMAN & WILLIAM REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 107(c)(2) (2d ed. 1993) (discussing whether a judgment can be given more weight by the enforcing state).

38. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 (1969) (noting that a judgment not on the merits will be recognized in other states only for issues actually decided); SCOLES & HAY, *supra* note 2, § 24.24.

39. *Saylor v. Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968) (noting that plaintiffs are entitled to be heard on the substance of the action as distinguished from matters of practice, procedure, jurisdiction, or form).

40. See, e.g., FED. R. CIV. P. 41(b) (stating that a plaintiff’s failure to comply with court rules may be grounds for dismissal).

41. See, e.g., *Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 543 (2d Cir. 1933) (noting that the case also may be time-barred by F-2’s statute of limitations or that F-2, because of a borrowing statute or some other choice of law rule, may apply F-1’s statute of limitations and refuse to hear the claim). See generally SCOLES & HAY, *supra* note 2, § 24.32 (discussing the problems posed by statutes of limitations).

claim.<sup>42</sup> In many cases, such dismissals result simply from errors in the pleading, and a subsequent well-pleaded complaint will be permitted. In other cases, however, a dismissal on demurrer may be regarded as preclusive because the defective complaint revealed a central and irreparable defect in plaintiff's case. In the latter type of cases, therefore, a dismissal should be accorded full faith and credit in later litigation.

### B. *Lack of Finality*

A judgment that is not final under the law of the state in which it was rendered is not entitled to full faith and credit.<sup>43</sup> For instance, in some jurisdictions, a judgment either on appeal or subject to appeal is not considered final.<sup>44</sup> Similarly, a judgment vacated in F-1 is not entitled to full faith and credit in F-2.<sup>45</sup> A judgment subject to modification in F-1 also is not considered a final judgment and need not be enforced by F-2.<sup>46</sup> For example, in most jurisdictions awards of custody and support are modifiable both prospectively and retrospectively.<sup>47</sup> The possibility of modification raises difficult full faith and credit issues.

Consider a case in which a wife has been awarded spousal support of \$1000 per month. The husband pays support for a while, but stops paying after moving to F-2. After six months, the wife returns to the F-1 court and obtains a judgment directly ordering the

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42. See FED. R. CIV. P. 12(b)(6) (stating that failure to state a claim upon which relief can be granted is grounds for dismissing the action).

43. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1969) (noting that "judgment will not be recognized or enforced in other states insofar as it is not a final determination under the local law of the state of rendition"); SCOLES & HAY, *supra* note 2, § 24.28 (stating that with the exception of support decrees, which may be subject to modification and thus technically not final until the obligation has been reduced to judgment, judgments that are not final in other respects may be denied recognition).

44. In federal courts, however, a judgment generally may not be appealed *until* it is final. *E.g.*, 28 U.S.C. § 1291 (granting the federal courts of appeals jurisdiction over "appeals from all final decisions of the district courts . . ."). On the different meanings of "final," see RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. b. (1980) (noting that for purposes of issue preclusion "final judgment" includes any prior adjudication of an issue if the judgment is sufficiently firm to be given conclusive effect).

45. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 112 (1969) (noting that a judgment that has been vacated, however, will "be recognized in other states to the extent that it remains a final determination of the issues decided under the local law of the state of rendition").

46. See *id.* § 109 (noting that a nonfinal judgment need not be recognized in a state other than the rendering state. A court is, however, free to recognize or enforce a judgment that remains subject to modification under the law of the state of rendition).

47. See RICHMAN & REYNOLDS, *supra* note 37, § 125.

husband to pay a sum certain, \$6000 in arrearages that have accrued since his last payment, and to continue to pay the wife \$1000 per month. Three months later, the wife, unable to satisfy the F-1 judgment in that state, sues the husband in F-2. The wife now wants an order from F-2 directing the husband to: (1) pay the \$6000 in accrued support under the F-1 lump sum judgment; (2) pay \$3000 for the support that has accrued between the date of the F-1 judgment and the present F-2 proceeding; and (3) pay \$1000 per month in the future.

The question posed is: which of those requested orders does the Full Faith and Credit Clause require the F-2 court to issue? First, the wife's request for an order concerning the \$6000 in accrued support must be granted full faith and credit in F-2 because it is a final, nonmodifiable F-1 judgment.<sup>48</sup> F-2, however, need not grant the third request for an order requiring \$1000 per month in future support. Because most jurisdictions allow an award of future support to be modified prospectively, and the Supreme Court has held that the national policy of full faith and credit does not require F-2 to enforce a judgment still modifiable in the state that rendered it,<sup>49</sup> F-2 is not required to grant full faith and credit to a modifiable award for future support.

The wife's second request raises a more difficult question. She seeks an order requiring payment of the support that accrued between the date of the F-1 judgment and the F-2 proceeding. The amount, while accrued, has not been reduced to judgment. In some jurisdictions, support awards may only be modified prospectively; in other words, the court may modify the award *only* with respect to payments that have not yet accrued.<sup>50</sup> In other jurisdictions, however, support awards are modifiable retrospectively as well. In those states, a court also may review the propriety of the award with regard to payments that have already accrued, but that have not been satisfied.

Once the complication of prospective and retrospective modification is removed, the application of the general rule of full faith and

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48. *Barber v. Barber*, 323 U.S. 77, 86 (1944) (holding that a North Carolina court's judgment for arrears in alimony, unconditional by its terms and not subject to modification or recall, was entitled to full faith and credit by a Tennessee court); *Lynde v. Lynde*, 181 U.S. 183 (1901).

49. *Sistare v. Sistare*, 218 U.S. 1, 26 (1910) (holding that when an alimony judgment amount is at the continuing discretion of the court that rendered it, no vested right to the sums exists and thus no full faith and credit entitlement exists).

50. See RICHMAN & REYNOLDS, *supra* note 37, § 125 (noting that this latter position is now the law with respect to child support payments).

credit becomes clear. On the one hand, F-2 must issue the wife's second requested order if F-1 does not permit its support awards to be modified retrospectively.<sup>51</sup> On the other hand, F-2 need not issue the order if support awards are retrospectively modifiable in F-1.<sup>52</sup> This case can be viewed as simply a more complicated example of the general rule that F-2 need not grant full faith and credit to F-1 judgments that are modifiable under F-1 law.

Although F-2 need not enforce a modifiable judgment, it is not precluded from doing so. The leading case on the enforcement of modifiable judgments is *Worthley v. Worthley*.<sup>53</sup> In *Worthley*, Justice Traynor indicated that an F-2 court generally should be willing to enforce modifiable awards.<sup>54</sup> The court noted that so long as the defendant has been given an opportunity to litigate the question of modifiability, defendant has not been disadvantaged. Moreover, it would be unfair to require plaintiff periodically to reduce accrued and unpaid alimony to an F-1 judgment simply to obtain a final and unmodifiable judgment, because the cost and delay involved in doing so considerably reduce the benefit that the support order was designed to produce.<sup>55</sup>

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51. See *Barber*, 323 U.S. at 86 (stating that a money judgment of a North Carolina court for arrears of alimony, unconditional by its terms and not subject to modification, was entitled to full faith and credit).

52. See *id.* at 80 (citing *Sistare*, 218 U.S. at 16-17, in support of the proposition that past due installments of a judgment for future alimony rendered in one State are within the protection of the Full Faith and Credit Clause unless the right to receive the alimony is so discretionary with the court rendering the decree that, even in the absence of application to modify the decree, no vested right exists).

53. 283 P.2d 19 (Cal. 1955).

54. *Id.* at 24; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 109 (1969) (noting that "the Constitution does not forbid the enforcement in a sister state of a judgment that is subject to modification under the local law of the state of rendition").

55. See *Worthley*, 283 P.2d at 25. The problem of interstate enforcement of child support decrees has produced legislative as well as judicial solutions. The REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 381 (1968), has been adopted in some form in every state. In the 1958 version of the Act as well as in the 1968 revision, provision was made for the enforcement and registration of foreign alimony awards. See *id.* at 540-50. Earlier versions (including the version available in California at the time of *Worthley*) included such a provision. For a more detailed treatment of the Act, see RICHMAN & REYNOLDS, *supra* note 37, § 125. The REVISED UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT, 13 U.L.A. 149 (1964), had been adopted in 42 states as of 1986. A new uniform act, the UNIFORM INTERSTATE FAMILY SUPPORT ACT, 9 U.L.A. 74 (Supp. 1993), also provides for interstate enforcement of child support judgments. See generally John J. Sampson, *Uniform Interstate Family Support Act (with Unofficial Annotations)*, 27 FAM. L.Q. 93 (1993).

### C. *Fraud in Obtaining the F-1 Judgment*

F-2 need not grant full faith and credit to an F-1 judgment that was procured by fraud.<sup>56</sup> Because "fraud" can be a very slippery term, the question really is: what type of fraud justifies F-2's refusal to give full faith and credit to an F-1 judgment? To answer this question, it is useful to return to basic full faith and credit principles. One of those principles is the Rule of Reciprocity, under which F-2 must give at least as much effect to an F-1 judgment as would an F-1 court.<sup>57</sup> Thus, F-2 may permit collateral attack on an F-1 judgment based on fraud only in those cases where F-1 would permit such an attack.

Fortunately, there is considerable agreement among state courts on the types of fraud that justify a collateral attack. First, it is quite clear that when fraud is an issue in the case, such as in a suit based on the tort of misrepresentation, it is subject to the same issue-preclusive effect as any other adjudicated issue when raised and adjudicated in F-1.<sup>58</sup> Second, many courts distinguish between extrinsic and intrinsic procedural fraud; the former provides a sufficient ground for denying full faith and credit to a sister state judgment, the latter does not.

Extrinsic fraud refers to a fraud that could not have been ruled on by the F-1 tribunal, *i.e.*, a fraud that deprived defendant of his opportunity to appear and defend.<sup>59</sup> A classic example of extrinsic fraud occurred in *Levin v. Gladstein*.<sup>60</sup> In *Levin*, plaintiff/seller (from Maryland) and defendant/buyer (from North Carolina) had a dispute over the quality of the goods sold. While defendant was visiting

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56. See SCOLES & HAY, *supra* note 2, § 24.17 (stating that "a judgment procured by fraud may be impeached and denied effect in the second forum"). See generally Michael Charles Pyles, *The Impeachment of Sister State Judgments for Fraud*, 25 SW. U. L. REV. 697 (1975) (discussing factors complicating the determination of the effect of fraud in seeking out-of-state recognition or enforcement of judgments).

57. See *supra* text accompanying notes 36-37.

58. In this context, fraud is the cause of action, not a potential defect in the judgment. See generally SCOLES & HAY, *supra* note 2, § 17.37 (noting that tort cases involving fraud or misrepresentation present no major choice-of-law problems: even when the fraudulent act and plaintiff's reliance thereon occur in separate states, the emphasis generally will be on the state in which reliance occurred); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(2) (1969) (delineating the relevant choice of law considerations when fraud or misrepresentation occur in different jurisdictions).

59. SCOLES & HAY, *supra* note 2, § 24.17 (noting that "[e]xtrinsic fraud is thought to go to the rendering court's jurisdiction, making the resulting judgment unenforceable for that reason").

60. 55 S.E. 371 (N.C. 1906).

plaintiff in Maryland, plaintiff had defendant served with process from the Maryland court.<sup>61</sup> Plaintiff and defendant then met and resolved their differences, and plaintiff assured defendant that he would withdraw the suit. Relying on plaintiff's representation, defendant returned to North Carolina and did not defend the Maryland action.<sup>62</sup> Rather than dismiss the case, however, plaintiff obtained a default judgment in Maryland and then sued defendant in North Carolina on the default judgment.<sup>63</sup> The North Carolina court refused to enforce the Maryland judgment on the grounds that it had been obtained by extrinsic fraud.<sup>64</sup> The fraud involved was extrinsic because it could never have been raised in the Maryland court. Indeed, the fraud deprived defendant of the opportunity to make any defense in the Maryland court.

Intrinsic fraud, by contrast, is fraud that the F-1 court would have the opportunity to rule on, such as perjured testimony or fabricated documentary evidence.<sup>65</sup> Because the losing litigant had an opportunity to reveal the fraud to the F-1 tribunal, the losing litigant is not permitted to raise the fraud issue by way of collateral attack in F-2.

Many modern authorities, however, have rejected this position on intrinsic fraud. They argue that a litigant's knowing use of fraudulent evidence may deprive her opponent of a fair hearing just as effectively as tricking him into a default judgment.<sup>66</sup> Further, if the defrauded litigant could not have known of the fabricated evidence, then that litigant really had no opportunity to reveal the fraud to the F-1 court and thus should not be precluded from raising the issue in a collateral attack in F-2. For these reasons, the *Restatement (Second) of Judgments* discards the distinction between intrinsic and extrinsic fraud and instead permits a party to obtain relief from a judgment based on fraudulent evidence if that party can show that "a reasonable effort [was made] in the original action to ascertain the truth of the matter."<sup>67</sup> Similarly, Rule 60(b)(3) of the Federal Rules of Civil Procedure now permits verdicts to be set aside if they were procured

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61. *Id.* at 372.

62. *Id.*

63. *Id.*

64. *Id.*

65. See SCOLES & HAY, *supra* note 2, § 24.17 (noting that in such a situation, "the party's right to due process will have been violated, the rendering court's jurisdiction will have been defective for that reason, and the resulting judgment should not be entitled to recognition").

66. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 70 cmt. c (1980); VERNON ET AL., *supra* note 32, at 612-13; SCOLES & HAY, *supra* note 2, § 24.17.

67. RESTATEMENT (SECOND) OF JUDGMENTS § 70(c) (1980).

by "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."<sup>68</sup> Thus, Rule 60(b) "reaches all fraud and rejects the confusing distinction between extrinsic and intrinsic fraud."<sup>69</sup>

Although Rule 60(b) and the *Restatement* promise to make the fraud exception more readily available in enforcement actions, the enforcing state still must inquire into whether the fraud is of the type that would preclude recognition of the judgment in the rendering state. An example is *In re Marriage of Verbin*,<sup>70</sup> in which the Washington Supreme Court refused to give full faith and credit to a Maryland custody decree.<sup>71</sup> The court found that the father had

falsely attested to the Maryland court that he was not involved in [custody] litigation. . . . Although he later admitted the fact of the Washington proceedings, . . . he never fully apprised the Maryland court of their nature and extent. The Maryland court thus had no reason to believe Washington could or would adequately protect the best interests of the children involved.<sup>72</sup>

Thus, the court refused to enforce the judgment even though a Maryland court perhaps would have enforced it regardless of the fraud. The Rule of Reciprocity<sup>73</sup> should have been followed because fraud should not prevent enforcement of an F-1 judgment in F-2 unless enforcement would be denied in F-1. The *Verbin* court, however, failed to make that inquiry.<sup>74</sup>

#### D. Lack of Jurisdiction in F-1

When a court lacks either personal or subject matter jurisdiction, its judgment is void and, therefore, is not entitled to full faith and credit in F-2.<sup>75</sup> That rule, perhaps as basic as the Iron Law of Full Faith and Credit, is subject to an important qualification. A court's findings on jurisdictional questions, like its findings on any other

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68. FED. R. CIV. P. 60(b).

69. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2860 (1973).

70. 595 P.2d 905 (Wash. 1979) (en banc).

71. *Id.* at 911-12 (holding that the decree was fraudulently obtained and was therefore not entitled to full faith and credit).

72. *Id.* at 911.

73. See *supra* text accompanying notes 36-37.

74. See *Verbin*, 595 P.2d at 911-12 (neglecting to evaluate whether the decree could be enforced in its original jurisdiction).

75. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 104-105 (1969).

relevant issue, will virtually always preclude relitigation of that issue.<sup>76</sup> Thus, an F-1 court's determination after litigation that it has jurisdiction, even though "in fact" it does not, may preclude the parties from relitigating the jurisdictional question in F-1 or in any other forum.<sup>77</sup> This is the basic application of the One-Bite Rule: Defendant is entitled to one, and only one, bite of the jurisdictional apple.<sup>78</sup>

1. *Lack of Jurisdiction Over the Person.*—If the asserted defect in the judgment is a lack of jurisdiction over the person, then the situation is relatively simple. When defendant appears in F-1 and fails to object to the court's jurisdiction, she waives the right to claim any jurisdictional defect involving her person. The defendant has in fact consented to F-1's exercise of jurisdiction over her.<sup>79</sup> Of course, instead of appearing generally and consenting to jurisdiction, defendant may make a special appearance for the sole purpose of challenging the F-1 court's jurisdiction.<sup>80</sup> When defendant appears specially to contest the F-1 court's jurisdiction, and the F-1 court rules that it has jurisdiction, a question arises as to whether defendant may relitigate the issue of F-1's jurisdiction in a second suit to enforce the subsequent F-1 judgment on the merits. The Supreme Court answered that inquiry definitively in *Baldwin v. Iowa State Traveling Men's Ass'n*.<sup>81</sup> Defendant in *Baldwin* had made a special appearance in F-1 to object to F-1's personal jurisdiction. When plaintiff sued in F-2 to enforce the judgment, defendant tried to raise the jurisdictional objection again.<sup>82</sup> The *Baldwin* Court held that defendant's remedy for an unsatisfactory decision on the jurisdictional issue is to appeal within the F-1 judicial system and, ultimately, to the Supreme Court.<sup>83</sup> Defendant may not reopen the jurisdictional issue in F-2.

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76. See *Durfee v. Duke*, 375 U.S. 106, 116 (1963) (noting that when the "jurisdictional issues [have] been fully and fairly litigated by the parties and finally determined . . . further litigation [is] precluded").

77. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 10, 12 (1980); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 96-97 (1969).

78. See *supra* text accompanying note 20.

79. See FED. R. CIV. P. 12(h) (stating that a defense of lack of jurisdiction is waived if it is neither made by motion nor included in a responsive pleading).

80. See RICHMAN & REYNOLDS, *supra* note 37, § 30.

81. 283 U.S. 522 (1931).

82. *Id.* at 524.

83. *Id.* at 525 (holding that a defendant could not reassert lack of jurisdiction as a defense in a Full Faith and Credit proceeding because the issue already had been adjudicated by an earlier court and noting that "those who have contested an issue shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties").

One complete judicial determination of the matter is enough.

A mere recitation in the F-1 judgment that the court had jurisdiction is not, of course, the sort of "litigation" that would preclude the jurisdictional issue from being litigated in F-2.<sup>84</sup> If it were, such a recitation could be included in every judgment, and defendant would be forced to appear in F-1 rather than being able to default and litigate F-1's jurisdiction in F-2. In cases containing only a recitation of jurisdiction, therefore, the defendant can suffer a default judgment in F-1 and then mount a collateral attack based on the absence of personal jurisdiction when plaintiff seeks enforcement of that judgment in F-2. That decision, of course, is fraught with risk: if F-2 decides that F-1 *did* have personal jurisdiction and enforces F-1's judgment, defendant will have lost the chance to contest the merits of the case. It is clear, however, that if the jurisdiction of F-1 is attacked within the F-1 forum, then defendant must appeal any unfavorable decision by the F-1 trial court through F-1's court system.<sup>85</sup>

2. *Lack of Jurisdiction Over the Subject Matter.*—If the asserted defect in the F-1 proceeding is a lack of subject matter jurisdiction, the foreclosure of collateral attack is slightly more problematic. Questions of subject matter jurisdiction implicate public interests that extend beyond the interests of the litigants themselves. Because of the strong public interest involved, defendant cannot consent to a lack of subject matter jurisdiction, nor can the parties confer subject matter jurisdiction on the court by agreement.<sup>86</sup> Federal courts are especially sensitive to defects involving subject matter jurisdiction,<sup>87</sup> because a federal court that exceeds its limited subject matter

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84. *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 468 (1873) (noting that "the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction . . . [and no] allegation contained in the record itself, however strongly made, can affect the right so to question it").

85. See RICHMAN & REYNOLDS, *supra* note 37, § 30 (discussing further the Hobson's Choice facing defendants).

86. 13 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, § 3522 (2d ed. 1984) (noting that the parties cannot waive lack of subject matter jurisdiction by express consent).

87. See, e.g., FED. R. CIV. P. 12(h)(3) (permitting the lack of subject matter jurisdiction to be raised by anyone at any time and requiring that it be raised by the court *sua sponte* in any event). In the state courts, a mistake of competence is not always treated as a "jurisdictional" error. In other words, some errors of competence may not furnish a ground for collateral attack. If the error is not "jurisdictional" according to the law of F-1, then F-2 must grant full faith and credit. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 106 (1969).

jurisdiction may be acting unconstitutionally.<sup>88</sup>

Nevertheless, the Supreme Court has held that litigation and adjudication—whether correct or not—of subject matter jurisdiction issues in F-1 may preclude their relitigation in F-2. In *Durfee v. Duke*,<sup>89</sup> plaintiff sued defendant in a Nebraska court to quiet title to a parcel of land adjacent to the Missouri River. The main channel of the Missouri River forms the boundary between Missouri and Nebraska. The Nebraska court had subject matter jurisdiction only if the land was in Nebraska. That question, in turn, depended upon a factual determination of whether a shift in the course of the river was the result of avulsion or accretion.<sup>90</sup> Defendant appeared in the Nebraska court and vigorously contested the court's subject matter jurisdiction. The Nebraska court nevertheless determined that it had jurisdiction and quieted title in plaintiff.<sup>91</sup> Defendant later sued plaintiff in a Missouri court to quiet title to the same land. Plaintiff contended that the Nebraska judgment was entitled to full faith and credit, while defendant claimed that the Missouri court could determine independently whether the Nebraska court had subject matter jurisdiction.<sup>92</sup> The question that faced the Supreme Court was whether the Nebraska court's finding that it had jurisdiction precluded relitigation of that issue in the subsequent Missouri action. The Supreme Court held that relitigation was precluded and laid down "the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court that rendered the original judgment."<sup>93</sup> In other words, the One-Bite Rule also applies to prevent relitigation of rulings on subject matter jurisdiction.

It would be tempting to conclude that the rule of *Durfee*, which provides that subject matter jurisdiction issues are precluded from relitigation if they were "fully and fairly litigated" in F-1, ended the inquiry.<sup>94</sup> The temptation arises because the rule is straightforward,

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88. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978) (noting that the limits upon federal jurisdiction, whether imposed by the Constitution or Congress, must be neither disregarded nor evaded).

89. 375 U.S. 106 (1963).

90. *Id.* at 108.

91. *Id.*

92. *Id.*

93. *Id.* at 111.

94. See *id.* The *Durfee* rule has been applied by the Supreme Court in a wide variety of contexts. See, e.g., *Stoll v. Gottlieb*, 305 U.S. 165, 172-77 (1938) (holding that in a prior bankruptcy proceeding the question of jurisdiction over the subject matter was raised and

succinct, and arguably correct.<sup>95</sup> Unfortunately, the Supreme Court also has decided cases that cannot be squared with the *Durfee* principle. For example, in *Kalb v. Feuerstein*,<sup>96</sup> the Court indicated that subject matter jurisdiction issues may furnish a ground for collateral attack, even after those issues have been fully and fairly litigated.<sup>97</sup> In *Kalb*, a state court erroneously concluded that it had jurisdiction over a matter that Congress, in federal bankruptcy legislation, had assigned to the exclusive jurisdiction of the federal courts.<sup>98</sup> The need to protect the integrity of the federal policy from a possibly hostile or unsympathetic state judiciary was considered strong enough to overcome the general rule of issue preclusion.<sup>99</sup> That result makes good sense because it prevents parties to an action from negligently or deliberately ignoring or under-valuing important federal policies.

To complicate matters further, the Supreme Court occasionally has indicated that issues of subject matter jurisdiction are foreclosed from collateral attack even though those issues never have been fully litigated. For example, in *Sherrer v. Sherrer*,<sup>100</sup> "litigation" of the jurisdictional issue of the wife's domicile consisted only of the

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determined adversely to the respondent; that determination was res judicata of that issue); *Dowell v. Applegate*, 152 U.S. 327, 340 (1894) (holding that a final decree of a federal court exercising federal question jurisdiction cannot be treated as a nullity when challenged collaterally); *Des Moines Navigation & R. Co. v. Iowa Homestead Co.*, 123 U.S. 552, 559 (1887) (holding that the Supreme Court of Iowa erred in failing to consider a question of prior adjudication on the ground that the issue was not raised before the first court by counsel for defendant).

95. See Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. 1003, 1006, 1009-14 (1967) (noting that the rule has been termed the "Bootstrap Principle" and discussing its general application); see also RESTATEMENT (SECOND) OF JUDGMENTS § 12(1) (1980) (stating that full faith and credit is not required when the "subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority . . ."). The authority supporting the Restatement section, however, is doubtful.

96. 308 U.S. 433 (1940).

97. *Id.* at 438-39 (noting that Congress, by its plenary power over the subject matter of bankruptcy, may by specific bankruptcy legislation create an exception to the principle that a final judgment by a court is not thereafter subject to collateral attack); cf. *Consolidated Rail Corp. v. Illinois*, 423 F. Supp. 941, 947-48 (Regional Rail Reorg. Ct. 1976) (holding that no preclusive effect should be given an earlier federal district court decision when Congress had reserved certain issues for a special court on railroad reorganization), *cert. denied*, 429 U.S. 1095 (1977). See generally Bennett Boskey & Robert Braucher, *Jurisdiction and Collateral Attack*, 40 COLUM. L. REV. 1006 (1940) (discussing the common law origins of the underlying policy considerations within the Supreme Court's decisions on the finality of jurisdictional determinations).

98. See *Kalb*, 308 U.S. at 438.

99. *Id.* at 438-39.

100. 334 U.S. 343 (1948).

husband's denial of jurisdiction in his answer. He did not offer proof on the question, nor did he cross-examine his wife.<sup>101</sup> The Court, nevertheless, held that the husband had an opportunity to contest the court's subject matter jurisdiction and, therefore, the issue could not be reopened by collateral attack in F-2.<sup>102</sup> Moreover, in *Chicot County Drainage District v. Baxter State Bank*,<sup>103</sup> there was no litigation of the jurisdictional question at all.<sup>104</sup> The Court, nevertheless, precluded collateral attack on the ground that the jurisdictional issue could have been raised in the first proceeding.<sup>105</sup>

Thus, the Court has given different and sometimes confusing signals on whether collateral attack based on lack of subject matter jurisdiction is permissible. *Durfee* holds that issues of subject matter jurisdiction are precluded if they have been fully litigated in F-1;<sup>106</sup> *Sherrer* and *Chicot County* indicate preclusion may occur in some cases even when little or no litigation of the jurisdictional issues took place in F-1;<sup>107</sup> and *Kalb* indicates that in other cases collateral attack is permissible despite full litigation in F-1.<sup>108</sup> The apparent difficulty in reconciling these cases<sup>109</sup> indicates a conflict between two fundamental principles. One principle dictates that when courts act beyond their subject matter jurisdiction, their actions are void. The other principle dictates that final judgments should not be reopened.<sup>110</sup> The difficulty in reconciling these conflicting principles, however, may be more apparent than real. When the policy behind the subject matter limitation is very strong, as in the balance between federal and state power at issue in *Kalb*, courts will tend to permit relitigation.<sup>111</sup> By contrast, when the policy supporting finality is especially press-

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101. *Id.* at 344.

102. *Id.* at 352 (noting that the husband's failure to contest the court's jurisdiction at the trial level precluded collateral relitigation of the issue).

103. 308 U.S. 371 (1940).

104. *Id.* at 377-78 (holding that the jurisdictional question was null because it could have been raised at trial, but was not).

105. *Id.* at 376, 378.

106. See *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

107. See *Sherrer v. Sherrer*, 334 U.S. 343, 352 (1948); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940).

108. See *Kalb v. Feuerstein*, 308 U.S. 433, 438-39 (1940).

109. See generally *Dobbs*, *supra* note 95, at 1019-27 (providing one attempt at reconciliation).

110. Both RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. a (1980) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 97 cmt. d (1969) articulate these two fundamental principles.

111. See *Kalb*, 308 U.S. at 438-39.

ing—for example, when there was full, fair, and vigorous litigation in F-1, as in *Durfee*<sup>112</sup>—collateral attack will be prohibited.<sup>113</sup>

### E. *The Land Taboo*

The preceding section discussed the requirement that F-1 have jurisdiction in a case if its judgment is to be recognized in F-2. Additional special rules apply to the recognition of foreign judgments affecting real property located in the forum. The law can be stated simply: an F-1 judgment that purports to affect directly the title to land located in F-2 need not be respected by F-2. The leading decision on this principle is *Fall v. Eastin*.<sup>114</sup> That case began with a divorce decree in Washington, accompanied by an order directing the husband, over whom the Washington court had personal jurisdiction, to convey Nebraska real property to his wife.<sup>115</sup> When the husband did not comply with the order, the Washington court appointed a commissioner who executed a deed in favor of the wife.<sup>116</sup> Subsequently, the wife brought an action in Nebraska to quiet title to the land in question.<sup>117</sup> The defendant in that action was the husband's grantee.<sup>118</sup> The Nebraska court held that because the Washington court lacked jurisdiction to affect title to land in Nebraska, the deed and decree need not be recognized.<sup>119</sup> The Supreme Court of the United States affirmed.<sup>120</sup> The majority opinion in *Fall* stands for the principle that one state cannot directly affect title to land located in another state.<sup>121</sup> To appreciate the

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112. See *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

113. The *Restatement (Second) of Judgments* takes the position that the policy of finality typically should prevail and that a judgment in a contested action (default judgments excepted) should not be vulnerable to collateral attack based on lack of subject matter jurisdiction. See RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1980). Section 12 provides only three limited exceptions to this rule: (1) when there is a "manifest abuse of authority," *id.* § 12(1); (2) when the judgment "would substantially infringe the authority of another tribunal or agency," *id.* § 12(2); and (3) when the court could not make an "informed determination" of its own jurisdiction, *id.* § 12(3). Case law supporting the exceptions framed in § 12 is exceedingly sparse.

114. 215 U.S. 1 (1909).

115. *Id.* at 3.

116. *Id.* at 4.

117. *Id.* at 5.

118. *Id.* at 4.

119. *Id.* at 7.

120. *Id.* at 14.

121. *Id.* at 8. Justice Holmes concurred, stating that although the Washington decree was entitled to full faith and credit, the Nebraska court could refuse to deny rights to the grantee as a matter of local law, even if the grantee was not a bona fide purchaser. *Id.* at 15 (Holmes, J., concurring).

scope of that rule, it is useful to consider two variations on the facts in *Fall*.

The first variation supposes that the husband, threatened by the Washington court with contempt, executed a deed conveying the Nebraska land to his wife. The *Fall* majority stated that such a conveyance, although executed under duress, would have been effective.<sup>122</sup> Although the actions of the Washington court in this variation would have affected title to land located in Nebraska, the husband's conveyance nevertheless would have been effective in Nebraska. The difference between this hypothetical situation and *Fall* itself is simply that, in the actual case, the Washington court attempted to affect title to Nebraska land *directly* by making its own conveyance. In the hypothetical situation, title is not directly affected by the court.

In the second variation on the facts in *Fall*, the wife asks the Nebraska court to enforce the Washington order requiring the husband to convey the land in question. The question becomes: what would have happened if the wife had sued the husband on the Washington equity decree, rather than suing his grantee based on the commissioner's deed? Would that equity decree have been entitled to full faith and credit? Today, the answer is most likely yes.<sup>123</sup> When *Fall* was decided, the answer perhaps was less clear because it was thought that an equity court decree need not be recognized by another state.<sup>124</sup> There, however, is scant functional reason to treat equity decrees, as a class, differently from legal judgments. Consequently, commentators today agree that equity decrees should be accorded full faith and credit,<sup>125</sup> and it appears that the Supreme Court agrees.<sup>126</sup>

These two variations on the facts in *Fall* suggest that the *Fall* rule, stating that only the situs forum has jurisdiction over controversies affecting real property within its territory, actually is quite limited.

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122. See *id.* at 6 (noting that courts may compel performance of its decrees by appropriate proceedings).

123. See *infra* notes 125-126 and accompanying text.

124. The distinction between a decree issued by an equity court and a decree issued by a court of law arose from the early belief that equity decrees acted only on the person and on the defendant's conscience. See generally Willis L. M. Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 189-90 (1957).

125. See, e.g., SCOLES & HAY, *supra* note 2, § 24.9; ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* § 82 (4th ed. 1986). This is also the position of *RESTATEMENT (SECOND) OF JUDGMENTS* § 43 (1980).

126. See, e.g., *Sistare v. Sistare*, 218 U.S. 1 (1910) (requiring that a nonmodifiable equity decree for support be given full faith and credit).

Nevertheless, the *Fall* rule is longstanding<sup>127</sup> and has not yet been repudiated by the Supreme Court. Whether the rule can be justified today, however, is not clear.

One possible justification for the rule is that because the situs jurisdiction has a strong interest in protecting the reliability of its land records, it must have the authority to ensure that those records are not confused by foreign decrees. The problem with that argument is that it is hard to see why a state cannot protect its land records adequately without discriminating against foreign judgments. Nebraska, for example, easily could require registration of foreign decrees affecting local land in a manner that would preserve the integrity of its land records.

A second justification for the *Fall* rule centers on the need of the situs jurisdiction to ensure that questions involving its realty are answered as that forum deems proper. There are, however, several flaws with that argument. First, it runs distinctly counter to the teaching of *Fauntleroy*, which holds that full faith and credit doctrine requires the enforcement of judgments rendered by other American courts regardless of how wrong those judgments may be.<sup>128</sup> Second, it is difficult to understand why a state's interest in protecting its land is sufficiently greater than its interest in protecting its residents to justify different treatment of the two under the Constitution. Finally, the premise that the situs is the jurisdiction with the strongest interest in the land often will prove false. As *Fall* itself illustrates, a decree concerning land may be only incidental to divorce litigation that is of far greater interest to another jurisdiction.<sup>129</sup> For the nonsitus court to resolve the questions before it properly, it must have the power to act effectively on those issues. An increasing number of courts have come to appreciate the weaknesses of the arguments supporting the *Fall* rule and have chosen to follow the more basic principles associated with the Full Faith and Credit Clause. Those courts have recognized foreign decrees affecting land within their jurisdiction on the basis of either comity<sup>130</sup> or full faith and credit.<sup>131</sup>

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127. The rule can be traced back to *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411).

128. See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

129. See, e.g., *Fall v. Eastin*, 215 U.S. 1, 14 (1909).

130. See, e.g., *Weesner v. Weesner*, 95 N.W.2d 682 (Neb. 1959) (holding that a Wyoming court had the power to render a divorce decree affecting land in Nebraska and that a Nebraska court had the authority to enforce personam obligations imposed by that Wyoming decree). Note that *Weesner* was decided 50 years after *Fall*, by the same state court.

Why did Mrs. Fall lose? Assuming that equity decrees were entitled to full faith and credit at the time of *Fall*, as they seem to be today, Mrs. Fall lost because she misunderstood her remedy. Instead of suing on the deed, she should have sued her husband or his grantee<sup>132</sup> in Nebraska on the decree.<sup>133</sup> Expressed in that manner, the rule in *Fall* is indeed limited: F-1's orders concerning land located in F-2 are entitled to full faith and credit, so long as they do not purport to transfer title directly.

#### IV. EXCEPTIONS TO THE IRON LAW II: F-2'S ABILITY (OR DUTY) TO IGNORE A VALID F-1 JUDGMENT UNDER THE VERY LIMITED RULE

Lack of jurisdiction in F-1 and F-1's rendition of a "penal" judgment based on another jurisdiction's laws sometimes are referred to as exceptions to the Iron Law of Full Faith and Credit. The case law confirms that an exception exists, but the exception is applicable only when a Very Limited Rule is invoked.

##### A. *The Lack of a Competent Court in F-2*

The law is well settled that a state may not refuse to enforce the judgment of another state on the ground that the original action could not have been brought in the state in which enforcement is sought. That is the lesson of *Fauntleroy*,<sup>134</sup> where F-2 was required to grant full faith and credit to an F-1 judgment notwithstanding the fact that the contract was made in F-2 and was illegal under F-2's laws.<sup>135</sup>

Any doubts about that conclusion should have been laid to rest by the Supreme Court's decision in *Kenney v. Supreme Lodge*.<sup>136</sup> In *Kenney*, Illinois was asked to enforce a judgment for wrongful death

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131. See, e.g., *Varone v. Varone*, 359 F.2d 769 (7th Cir. 1966) (holding that a Michigan divorce decree, including an order requiring husband to convey his interest in Illinois land, was entitled to full faith and credit under Illinois law and was not subject to collateral attack in a subsequent proceeding brought by the wife to enforce the Michigan decree).

132. It may have been that the husband's grantee was a bona fide purchaser. If so, the grantee may not have been bound by the equity decree against the husband. See 6A RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 904(3) (Patrick J. Rohan ed., 1993) (noting that the purpose of recording acts is to protect bona fide purchasers, whose rights are afforded special status).

133. See generally Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954) (discussing methods of avoiding the *Fall* rule).

134. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

135. *Id.* at 234, 237; see also *supra* notes 10-20 and accompanying text.

136. 252 U.S. 411 (1920).

rendered in Alabama. The Illinois court held that, because the original action could not have been brought in Illinois, its courts lacked jurisdiction over a suit to enforce the Alabama judgment.<sup>137</sup> The Supreme Court reversed, with Justice Holmes writing: “[I]t is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.”<sup>138</sup> Thus, a claim that has been reduced to judgment in F-1 must be enforced by F-2, even though the claim is one that could not have been brought in F-2 originally.<sup>139</sup> That policy is strongly in accord with the principles established in *Fauntleroy*.

There seem to be only two limits on the *Kenney* doctrine. First, a state is not required to permit a suit to enforce a judgment brought by one who lacks capacity to sue under forum law.<sup>140</sup> In *Anglo-American Provision Co. v. Davis Provision Co.*,<sup>141</sup> for example, the Supreme Court upheld the refusal of the New York courts to entertain a suit between foreign corporations based on a foreign judgment.<sup>142</sup> A second limit on the *Kenney* doctrine is that a judgment creditor seeking to enforce an F-1 judgment in F-2 must seek relief of a type ordinarily available in F-2.<sup>143</sup> That requirement ordinarily presents no problem because most judgment creditors seek to recover a money judgment, and there are mechanisms for debt collection in all states. The Constitution, however, does not require a state to provide procedures for enforcement that are not available to litigants in purely domestic actions.<sup>144</sup>

### B. Penal Judgments

Discussions of penal judgments customarily begin by quoting Chief Justice Marshall: “The Courts of no country execute the penal

137. *Id.* at 414.

138. *Id.* at 415.

139. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. d (1969) (noting that in a suit for enforcement of a judgment, it is immaterial whether the state was competent to hear the original action).

140. *Id.*; see also SCOLAS & HAY, *supra* note 2, § 24.22; GEORGE STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 119-20 (3d ed. 1963).

141. 191 U.S. 373 (1903).

142. *Id.* at 375-76.

143. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. d (1969) (noting that it is possible that a judgment providing for some peculiar relief will not be enforceable in a sister state).

144. STUMBERG, *supra* note 140, at 118 & n.32 (“If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution . . . . But the Constitution does not require the state to provide such a court.” (quoting *Anglo-American Provision Co.*, 191 U.S. at 374)).

laws of another."<sup>145</sup> Marshall's words are relevant in two conflict of laws contexts: (1) whether a court may refuse to hear a case based on a sister state statute that is penal; and (2) whether F-2 may refuse to grant full faith and credit to an F-1 judgment that is based upon a penal statute. Only the second question is treated in this Article.<sup>146</sup>

Valid F-1 judgments based on purely penal claims are not entitled to full faith and credit in F-2.<sup>147</sup> In *Huntington v. Attrill*,<sup>148</sup> however, the Supreme Court considerably restricted the scope of this exception to the Full Faith and Credit Clause by assigning a narrow meaning to the word "penal." The *Huntington* Court required enforcement of a judgment unless that judgment was based upon a statute that is penal in the "international sense."<sup>149</sup> The Court then noted that whether a statute is penal in the international sense "depends upon . . . whether its purpose is to punish an offence against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."<sup>150</sup> That language seems to establish a two-part test to determine whether a judgment is "penal." For a judgment to be penal in the international sense, its purpose must be to punish, rather than to recompense, and the recovery must be in favor of the state, not a private individual.<sup>151</sup>

Applying that test, judgments awarding double or treble damages are not penal so long as recovery is in favor of a private individual. Wrongful death judgments also are not penal, even in cases where defendant's fault is the measure of recovery, because recovery compensates a private individual. Furthermore, a judgment in favor of the state for tortious conduct against the state's proprietary interests is not penal because its purpose also is compensation, not punishment. Although the recovery in a tax judgment is in favor of the state, the purpose of tax statutes is to generate revenue, not to punish taxpayers. Such judgments do not fall within the *Huntington* definition of penal and, therefore, are entitled to full faith and credit in other states.<sup>152</sup>

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145. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).

146. See RICHMAN & REYNOLDS, *supra* note 37, § 49, for a discussion of the first question. See generally Robert Leflar, *Extra State Enforcement of Penal and Governmental Judgments*, 46 HARV. L. REV. 193 (1932).

147. See LEFLAR ET AL., *supra* note 125, § 75.

148. 146 U.S. 657 (1892).

149. *Id.* at 673.

150. *Id.* at 673-74.

151. See *id.*

152. See *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 279 (1935) (holding that a judgment "is not to be denied full faith and credit . . . merely because it is for taxes").

V. THE PUBLIC POLICY OF F-2: THE PROBLEM OF  
*RESTATEMENT (SECOND) SECTION 103*

F-2 may not refuse full faith and credit to an F-1 judgment simply because that judgment is based upon a claim that violates the public policy of F-2.<sup>153</sup> This part of the Iron Law has been applied rigorously. In *Fauntleroy*, the Supreme Court required Mississippi to give full faith and credit to a Missouri judgment, even though that judgment was based upon a "futures" contract outlawed in Mississippi as against its public policy.<sup>154</sup>

A. *Section 103 and Yarborough*

Although F-2 must give full faith and credit to an F-1 judgment even if the judgment violates F-2's public policy, are there situations in which F-2 may refuse full faith and credit to a valid F-1 judgment because recognition of that judgment would entail too great a sacrifice of F-2's important interests? Section 103 of the *Restatement (Second) of Conflict of Laws* states that there are such cases: "A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State."<sup>155</sup> In other words, Section 103 takes the quite controversial position that there are some F-1 judgments that are perfectly valid under the Due Process Clause, yet not entitled to full faith and credit in F-2.

Much of the inspiration for Section 103 came from Justice Stone's dissent in *Yarborough v. Yarborough*.<sup>156</sup> In *Yarborough*, a father made a lump sum child support payment to his daughter pursuant to a Georgia judgment.<sup>157</sup> That payment, according to Georgia law,

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This rule includes administrative tax determinations. See *City of New York v. Shapiro*, 129 F. Supp. 149, 154 (D. Mass. 1954) (holding that administrative determinations are entitled to full faith and credit); see also *SCALES & HAY*, *supra* note 2, § 24.23 (urging that all penal judgments are entitled to full faith and credit, especially in light of the modern trend to subject business entities to substantial regulatory penalties for toxic pollution, antitrust, and securities violations, as well as other corporate misdeeds). See generally *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 89 Reporter's Note (1969) (containing a more complete list of cases classified as penal or nonpenal).

153. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 117 (1969).

154. See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

155. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 103 (1969).

156. 290 U.S. 202 (1933).

157. *Id.* at 206.

exhausted his obligations to the child.<sup>158</sup> The daughter later sued him in South Carolina, her domicile, for additional educational and maintenance support.<sup>159</sup> The Supreme Court ruled that the Georgia judgment was entitled to full faith and credit in South Carolina and that the F-1 judgment precluded the daughter's subsequent action for support in F-2.<sup>160</sup>

Justice Stone wrote a sharp dissent based upon the "intent" of the Georgia order and the strong South Carolina interest in the child. Justice Stone first argued that the Georgia order was rendered with the sole purpose of regulating the relationship of the parties in Georgia, and therefore, the Georgia court had not intended to control the parties' rights and duties in South Carolina.<sup>161</sup> Stone's next argument was far more radical. He argued that South Carolina had an important interest in the maintenance and support of its children and that a sister-state judgment ought not to be permitted to jeopardize that interest.<sup>162</sup> Stone did not suggest that the Georgia judgment was invalid. Rather, he argued that the judgment was not entitled to recognition in South Carolina because the Full Faith and Credit Clause does not authorize "such control by one state of the internal affairs of another."<sup>163</sup> The basic thrust of his argument and the dominant theme behind *Restatement* Section 103 appears in this passage from Stone's dissent:

Between the prohibition of the due process clause, acting upon the courts of the state from which such proceedings may be taken, and the mandate of the full faith and credit clause, acting upon the state to which they may be taken, there is an area which federal authority has not occupied. . . . In the assertion of rights, defined by a judgment of one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other.<sup>164</sup>

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158. *Id.*

159. *Id.* at 204.

160. *Id.* at 212.

161. *Id.* at 213-14 (Stone, J., dissenting).

162. *Id.* at 220-23 (Stone, J., dissenting).

163. *Id.* at 214 (Stone, J., dissenting).

164. *Id.* at 214-15 (Stone, J., dissenting).

Despite Justice Stone's eloquence and the prestige of the American Law Institute, it is quite doubtful that Section 103 provides an accurate statement of the law.<sup>165</sup> Nevertheless, advocates of Section 103 can look to Supreme Court cases in two areas for support:<sup>166</sup> domestic relations and workers' compensation.

### B. *The Domestic Relations Cases*

*Williams v. North Carolina (Williams II)*<sup>167</sup> provides the least ambiguous support for Section 103. An earlier decision, *Williams v. North Carolina (Williams I)*,<sup>168</sup> had held that the domicile of a deserting spouse (F-1) has jurisdiction to grant a valid divorce.<sup>169</sup> In *Williams II*, however, the Court held that the state of the matrimonial domicile (F-2) could re-examine the jurisdictional finding of domicile.<sup>170</sup> *Williams II* provides that if, after according F-1's finding of domicile "respect, and more,"<sup>171</sup> F-2 finds the deserting spouse had no bona fide F-1 domicile, not only may it refuse to recognize the divorce decree of F-1, but it also may prosecute the deserting spouse for bigamous cohabitation.<sup>172</sup> The holding in *Williams II* supports Section 103 because it permits F-2 to deny full recognition to an F-1 judgment based on F-2's strong policy interest in marriage:

In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil[e] is a jurisdictional fact. To permit

165. See SCOLAS & HAY, *supra* note 2, § 24.21 (arguing that limitations on full faith and credit are based on a policy of preclusion rather than on avoiding interstate conflict); see also Ronald A. Hecker, *Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 CAL. L. REV. 282 (1966) (arguing that the *Restatement* improperly relies on dicta and concurring and dissenting Supreme Court opinions).

166. There is another group of cases that provides support for Section 103, but no appeals of these cases have yet reached the Supreme Court: cases in which F-1 prohibits a person from bringing an action in F-2's courts. Imagine that an F-1 court with in personam jurisdiction over plaintiff enjoins him from bringing an action in F-2. Plaintiff, however, disobeys the injunction and files suit in F-2. Does the Full Faith and Credit Clause compel F-2 to recognize the F-1 order and dismiss the suit? Courts in these cases have held that F-2 need not grant full faith and credit. They rely on the notion that F-1 ought not to be able to control the workings of the F-2 court. See, e.g., *James v. Grand Trunk W. R.R. Co.*, 152 N.E.2d 858 (Ill.), *cert. denied*, 358 U.S. 915 (1958); *Lowe v. Norfolk & W. Ry. Co.*, 421 N.E.2d 971 (Ill. App. 1981). See generally Comment, *Extraterritorial Recognition of Injunctions Against Suit*, 39 YALE L.J. 719 (1930).

167. 325 U.S. 226 (1945).

168. 317 U.S. 287 (1942).

169. *Id.* at 298-99.

170. *Williams II*, 325 U.S. at 230.

171. *Id.* at 233.

172. *Id.* at 233-34.

the necessary finding of domicil[e] by one State to foreclose all States in the protection of their social institutions would be intolerable.<sup>173</sup>

Although the "intolerable" language above supports Section 103, the *Williams II* holding is easily limited to the hornbook proposition that the enforcing state may inquire into the existence of subject matter jurisdiction underlying an ex parte judgment.<sup>174</sup>

The "divisible divorce" cases, *Estin v. Estin*<sup>175</sup> and *Vanderbilt v. Vanderbilt*,<sup>176</sup> hold that F-2, the wife's domicile, need not give full faith and credit to an order from F-1, the husband's domicile, cutting off the wife's right to alimony.<sup>177</sup> Nevertheless, those holdings provide only equivocal support for Section 103. Although there is language in each opinion indicating concern for the important interests of F-2,<sup>178</sup> each opinion also contains language suggesting that the holdings are based on the wife's right not to be deprived of her property without due process.<sup>179</sup> Thus, nonrecognition of F-1's judgment was based on a litigant's due process rights, not on concern over the policy interests of F-2.

*May v. Anderson*,<sup>180</sup> a custody case, also is ambiguous in its support for Section 103. The *May* Court held that F-2, the wife's domicile, need not give full faith and credit to an order issued by F-1, the husband's domicile, giving custody of the couple's children to the husband.<sup>181</sup> Once again, the case may be explained on two different grounds: concern either for protecting the policy interests of F-2<sup>182</sup> or for protecting the wife's due process right not to be

173. *Id.* at 232.

174. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 104-105 (1969).

175. 334 U.S. 541 (1948). For a thorough discussion of *Estin* and *Vanderbilt*, see RICHMAN & REYNOLDS, *supra* note 37, § 120.

176. 354 U.S. 416 (1957).

177. See *Estin*, 334 U.S. at 549; *Vanderbilt*, 354 U.S. at 419.

178. See, e.g., *Estin*, 334 U.S. at 546-47 (noting that issues of bigamy or bastardy arising from marital recognition or nonrecognition are legitimate concerns, and a state should have the ability to guard its interest in these matters).

179. See, e.g., *Estin*, 334 U.S. at 548-49; *Vanderbilt*, 354 U.S. at 418-19.

180. 345 U.S. 528 (1953). For a detailed discussion of *May*, see RICHMAN & REYNOLDS, *supra* note 37, § 127 (noting that *May* is an extremely murky opinion with its true explanation almost impossible to decipher).

181. *May*, 345 U.S. 528-29.

182. See *id.* at 532 (noting that under Ohio procedure the writ of habeas corpus settles only the immediate right to possession of the children, but does not settle the question of future custody).

deprived of custody by a court that lacked personal jurisdiction over her.<sup>183</sup>

In sum, all of these cases provide only scant support for Section 103's public policy exception to the full faith and credit requirement. Given the tenor of the Court's other decisions, especially *Fauntleroy*,<sup>184</sup> the more likely reading of these domestic relations cases is that the Court was concerned about protecting the property rights of the absent litigant, *i.e.*, the "stay-at-home" spouse or parent, rather than about protecting the policy interests of F-2. That reading is rendered even more compelling by the unwillingness of the Court in any family law case since *Williams II* to permit F-2 to refuse to recognize an F-1 decree on the grounds of the public policy of F-2.

### C. *The Early Workers' Compensation Cases*

*Magnolia Petroleum Co. v. Hunt*<sup>185</sup> was the first workers' compensation case to discuss the conflict between the mandate of full faith and credit and the important interests of F-2. In *Magnolia Petroleum*, the employee, a Louisiana resident who normally worked in Louisiana, travelled to Texas in the course of his employment, where he sustained work-related injuries.<sup>186</sup> The employee received a compensation award from the Texas Industrial Accident Board, and the employer's insurer began making payments as required by the award.<sup>187</sup> The employee later sought to collect workers' compensation under a Louisiana statute.<sup>188</sup> The employer pleaded the Texas award as *res judicata*, but the Louisiana court rejected his contention.<sup>189</sup> The Supreme Court reversed in an opinion by Justice Stone, ruling that because the Texas award was entitled to full faith

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183. See *id.* at 533-34 (holding that the Wisconsin court could not deprive the wife of her personal right to the custody of her children because the court lacked personal jurisdiction over her).

184. *Fauntleroy*, it will be recalled, originated the "Iron Law" of Full Faith and Credit. See, *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908); see also *supra* text accompanying notes 10-20.

185. 320 U.S. 430 (1943).

186. *Id.* at 432.

187. *Id.* at 432-33.

188. *Id.* at 433. The issue in workers' compensation cases is not whether the worker can receive a double recovery. If a second suit is allowed and F-2's measure of compensation is higher than F-1's, then the F-2 tribunal simply credits the employer for the amount of the F-1 award and awards the employee the difference. The result is that the employee can receive two awards from two states, but the total amount of compensation will be limited to the amount proper under the statutory scheme of the state allowing the higher award.

189. *Id.* at 433-34.

and credit in Louisiana, there could be no higher award under the Louisiana statute.<sup>190</sup>

In separate dissents, Justices Douglas and Black made the same arguments Justice Stone had found so convincing in *Yarborough*. Both argued that the Texas award was not *intended* to bind the parties in Louisiana and that, regardless of the "intent" of the Texas award, it *could not* bind Louisiana to a judgment in a matter so important to Louisiana's social policy and interests.<sup>191</sup>

Four years later, in *Industrial Commission v. McCartin*,<sup>192</sup> the Supreme Court substantially overruled *Magnolia Petroleum*, relying heavily on the "not intended" argument. Employer and employee, both residents of Illinois, contracted in Illinois for the employee to work in Wisconsin, where he was injured in the course of his employment.<sup>193</sup> The employee sought workers' compensation benefits in both states.<sup>194</sup> The parties reached a settlement in the Illinois proceeding with a settlement contract that specifically provided that the settlement would "not affect any rights that [employee] may have under the Workmen's Compensation Act of the State of Wisconsin."<sup>195</sup> Subsequently, the employee received a larger award from the Wisconsin Commission, which was set aside by a Wisconsin appellate court under the authority of *Magnolia Petroleum*.<sup>196</sup>

Relying heavily on language in the Illinois award expressly stating that the award would not affect any rights under Wisconsin law,<sup>197</sup> the Supreme Court reversed.<sup>198</sup> The opinion indicated, however, that even absent such language, courts should be reluctant to construe a workers' compensation award in F-1 to preclude a subsequent, higher award in F-2:

But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. . . . [W]e should not readily interpret such a statute so as to cut off an employee's right

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190. *Id.* at 444.

191. *See id.* at 450 (Douglas, J., dissenting); *id.* at 455-56 (Black, J., dissenting).

192. 330 U.S. 622 (1947).

193. *Id.* at 623.

194. *Id.* at 623-24.

195. *Id.* at 624 (citation omitted).

196. *Id.*

197. *Id.* at 629-30.

198. *Id.* at 630.

to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction.<sup>199</sup>

Predictably, "unmistakable language" is quite rare in workers' compensation statutes because state legislatures ordinarily give little thought to the extraterritorial effects of their workers' compensation statutes.<sup>200</sup> Thus, by relying on the "not intended" argument, the Supreme Court carved a substantial exception out of the Full Faith and Credit Clause for workers' compensation awards.<sup>201</sup> Although the Court's reasoning is obscure, the exception seems to be policy-based. In addition, although the exception is analytically suspect,<sup>202</sup> at least it had this to recommend it: it was easy to apply, and was narrowly circumscribed because it appeared to apply to workers' compensation awards and nothing else.

#### D. *The Thomas Opinions*

1. *The Plurality Opinion*.—This cautious treatment of the Section 103 issue was abandoned by the plurality opinion in *Thomas v. Washington Gas Light Co.*<sup>203</sup> In *Thomas*, an employee who was a resident of the District of Columbia worked for his employer in the District, Maryland, and Virginia.<sup>204</sup> In the course of his employment in Virginia, he sustained a back injury.<sup>205</sup> He received an award under the Virginia Workmen's Compensation Act and later sought to receive a supplemental award under the District of Columbia Act.<sup>206</sup> The administrative tribunals in the District granted the supplemental award, but the Court of Appeals for the Fourth Circuit reversed, holding that the Virginia award was entitled to full faith and credit.<sup>207</sup> A divided Supreme Court reversed.<sup>208</sup>

199. *Id.* at 627-28.

200. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 274-75 (1980) (observing that "a state legislature seldom focuses on the extra-territorial effect of its enactments . . .").

201. See *McCartin*, 330 U.S. at 629-30.

202. See *infra* text accompanying notes 209-213, 240-243 (discussing criticisms of the *McCartin* rule).

203. 448 U.S. 261 (1980).

204. *Id.* at 264.

205. *Id.*

206. *Id.* at 264-65.

207. *Id.* at 265-66.

208. *Id.* at 266.

The plurality opinion by Justice Stevens (joined by Justices Brennan, Stewart, and Blackmun) rejected both the "unmistakable language" formulation of *McCartin* and the strict full faith and credit view of *Magnolia Petroleum*. The plurality rejected the *McCartin* rule precisely because *McCartin* relied on the "not intended" argument.<sup>209</sup> The Court noted that a state does have indirect control over the treatment of its judgments in sister states because it can determine the effect of a judgment by prescribing its effects within the state.<sup>210</sup> Once F-1 has prescribed the judgment's effect within its own state, however, the Full Faith and Credit Clause, as interpreted by the Supreme Court, determines the judgment's extraterritorial effect.<sup>211</sup> Thus, according to the plurality, by focusing on the extraterritorial intent of the rendering state, the *McCartin* rule improperly delegated to that state a power properly exercised only by the Supreme Court.<sup>212</sup> The Court held that once a state has determined the domestic effect of a judgment through its judiciary and legislature, that state cannot expand or contract the judgment's extraterritorial effect by using "unmistakable language" indicating its intentions.<sup>213</sup>

The plurality next rejected the *Magnolia Petroleum* rule because it was not consistent with settled practice.<sup>214</sup> Before *Magnolia Petroleum*, the states did not grant preclusive effect to sister-state workers' compensation awards.<sup>215</sup> Further, the plurality noted that *McCartin* had substantially overruled *Magnolia Petroleum*.<sup>216</sup> In the thirty years since *McCartin*, only one state had included "unmistakable language" in its statute.<sup>217</sup> Thus, the practice of most courts, both before *Magnolia Petroleum* and after *McCartin*, was to deny full faith and credit to workers' compensation awards.

Having rejected the approaches of both *Magnolia Petroleum* and *McCartin*, the *Thomas* plurality took a fresh look at the problem and finally based its solution on the kind of interest balancing suggested

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209. *Id.* at 270-71 (noting that the *McCartin* rule's focus on extra-territorial intent is an unwarranted delegation to the states of the court's power to decide full faith and credit questions).

210. *Id.* at 270.

211. *Id.* at 271.

212. *Id.*

213. *Id.* at 271-72.

214. *Id.* at 273.

215. *Id.* (noting that *Magnolia Petroleum* "effected a dramatic change in the law").

216. *Id.* at 274-77; see *Industrial Comm'n v. McCartin*, 330 U.S. 622, 629-30 (1947).

217. See NEV. REV. STAT. § 616.525 (1979) (stating that any recovery constitutes a "full and complete release of such employer from any and all liability").

by Section 103. The opinion identified three relevant state interests: (1) Virginia's interest in limiting the liability of employers within the state and their insurers; (2) the interests of both jurisdictions in compensating the injured worker; and (3) Virginia's interest in having the integrity of its administrative proceedings respected by other states.<sup>218</sup>

The first two interests were quickly dismissed. First, the common interest of Virginia and the District of Columbia in compensating an injured worker could not be harmed by permitting a supplemental award.<sup>219</sup> In addition, Virginia's interest in limiting employer liability did not receive much weight because an employee could seek compensation under either the Virginia or the District of Columbia workers' compensation statute.<sup>220</sup> Employers and their insurers simply would have to measure their potential liability by the more generous of the two workers' compensation statutes.<sup>221</sup> Second, giving strong preclusive effect to a workers' compensation award would place a premium on an injured worker's ability to make the correct initial choice of forum. The *Thomas* plurality reasoned that such an emphasis on forum shopping was inappropriate in an area where proceedings are initiated informally and often without advice of counsel.<sup>222</sup>

With these two interests discounted, Virginia's interest in the integrity of its quasi-judicial proceedings remained to be considered. In assessing that interest, the opinion relied on an argument originally made by proponents of Section 103 based on the distinction between judicial and administrative proceedings and the full faith and credit due to each.<sup>223</sup> The plurality drew a sharp distinction be-

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218. See *Thomas*, 448 U.S. at 277.

219. *Id.* at 280.

220. *Id.* at 279-80.

221. See *id.* at 280.

222. See *id.* at 284.

223. See Willis L. M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 176-77 (1949); Elliott E. Cheatham, *Res Judicata and the Full Faith and Credit Clause*: *Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330, 341-46 (1944). Although the *Thomas* plurality opinion cites both articles, it does not credit either for originating this particular argument. The dissent noticed that omission and credited the commentators for the plurality's argument. *Thomas*, 448 U.S. at 292 n.2 (Rehnquist, J., dissenting). The argument, in fact, may have appeared even earlier, for there is at least a hint of it in Justice Black's dissent in *Magnolia Petroleum*, 320 U.S. at 453 (observing that "the jurisdiction of the Accident Board is limited to administration of the Texas Workmen's Compensation Act; even if the issues of liability under Louisiana law had been raised they could not have been decided by that Board.").

tween a court of general jurisdiction and an administrative tribunal.<sup>224</sup> Although the plurality believed that the factual findings of both were entitled to extraterritorial recognition, the claim-preclusive effect of an administrative award should not be the same as that of an ordinary court-issued judgment.<sup>225</sup> On the one hand, in a court of general jurisdiction in F-1, the parties can argue that the law of F-2 should control, and the F-1 court can decide this issue.<sup>226</sup> When it does so, it has before it the important interests of F-2 as embodied in F-2's law. On the other hand, an F-1 administrative tribunal can apply only the law that its statutory authorization permits, *i.e.*, the law of F-1.<sup>227</sup> Accordingly, it makes sense to distinguish between an ordinary judgment and an administrative award when questions of full faith and credit arise. Because F-2's interests can be raised before an F-1 court, F-2 may not deny full faith and credit to an F-1 judgment based on those interests. Conversely, because F-2's interests cannot be raised before an F-1 administrative tribunal, F-2 may consider whether those interests are protected when determining whether to recognize the F-1 award. The plurality summarized its argument by stating:

[W]hether or not the worker has sought an award from the less generous jurisdiction in the first instance, the vindication of that State's interest in placing a ceiling on employers' liability would inevitably impinge upon the substantial interests of the second jurisdiction in the welfare and subsistence of disabled workers—interests that a court of general jurisdiction might consider, but which must be ignored by the Virginia Industrial Commission.<sup>228</sup>

The plurality's argument, which can be labelled "the limited choice of law" argument, appears to be a limited resurrection of Justice Stone's (and Section 103's) notion of an exception to full faith and credit based on the important policy interests of F-2.

2. *The Concurrence and the Dissent.*—Justice White concurred with the plurality in an opinion joined by Chief Justice Burger and Justice Powell. Justice White challenged the "limited choice of law" argu-

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224. *Thomas*, 448 U.S. at 281-82.

225. *Id.* (noting that because an administrative agency has limited authority, constitutional rules applicable to agency decisions are not necessarily the same rules applicable to court decisions).

226. *Id.* at 282.

227. *Id.*

228. *Id.* at 285.

ment with a powerful *reductio ad absurdum* hypothetical. He suggested that the argument might apply just as well to an ordinary tort action in which the F-1 court was constrained to apply F-1 law by a strong statutory or judge-made, forum-favoring choice-of-law rule.<sup>229</sup> If the plurality's reasoning applies in such a case and it is difficult to distinguish the hypothetical case from *Thomas*, then that argument proves too much because it seems to require a wholesale re-evaluation of the Full Faith and Credit Clause.<sup>230</sup> In Justice White's words:

[T]he plurality's rationale would portend a wide-ranging reassessment of the principles of full faith and credit in many areas. Such a reassessment is not necessarily undesirable if the results are likely to be healthy for the judicial system and consistent with the underlying purposes of the Full Faith and Credit Clause. But at least without the benefit of briefs and arguments directed to the issue, I cannot conclude that the rule advocated by the plurality would have such a beneficial impact.<sup>231</sup>

Justice White advocated the *McCartin* approach. Although he thought *McCartin* rested on "questionable foundations,"<sup>232</sup> he nevertheless favored it over the plurality's approach because it was narrowly limited to workers' compensation cases and less likely to have untoward ramifications elsewhere.<sup>233</sup>

Justice Rehnquist's dissenting opinion, in which Justice Marshall joined, also rejected the "limited choice of law" argument.<sup>234</sup> Rehnquist thought the plurality radically underestimated Virginia's interest in the finality of its workers' compensation determination.<sup>235</sup> Because Virginia invested time and money in the resolution of the

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229. *Id.* at 287 (White, J., concurring). An apt example is provided by *Semler v. Psychiatric Inst.*, 575 F.2d 922 (D.C. Cir. 1978). That case involved a successful wrongful death action in Virginia followed by an attempt by the Virginia plaintiff to recover survivor's benefits under the law of the District of Columbia. *Id.* at 924. The court rejected that effort, in part because the plaintiff could have sued originally either in the District of Columbia or in Virginia. *Id.* at 926. Plaintiff attempted to analogize her case to *McCartin* because the District of Columbia, unlike Virginia, distinguished between wrongful death and survivor's recovery and would have permitted the later action. The Court of Appeals, however, found it easy to distinguish *McCartin* and *Magnolia Petroleum* on the simple (albeit conclusory) ground that those cases did not apply in an "ordinary choice-of-law case." *Id.* at 930.

230. *See, e.g., Thomas*, 448 U.S. at 285.

231. *Id.* at 288 (White, J., concurring).

232. *Id.* at 289 (White, J., concurring).

233. *Id.* (White, J., concurring).

234. *Id.* at 293 (Rehnquist, J., dissenting).

235. *Id.* (Rehnquist, J., dissenting).

dispute, it had an interest in seeing that its resources were not wasted by duplicative litigation in another state.<sup>236</sup> Rehnquist's fundamental dispute with the plurality transcended these points, however. He objected to the whole notion of "interest balancing" as a technique for interpreting the Full Faith and Credit Clause. Rehnquist stated that although the balancing of interests has a role in the choice-of-law inquiry, it has no place in the discussion of the interstate recognition of judgments.<sup>237</sup>

The Full Faith and Credit Clause did not allot to this Court the task of "balancing" interests where the "public Acts, Records, and judicial Proceedings" of a State were involved. It simply directed that they be given the "Full Faith and Credit" that the Court today denies to those of Virginia.<sup>238</sup>

Justice Rehnquist rejected the *McCartin* rule as well as the plurality's "balancing" approach. Instead, he favored a return to the rule of *Magnolia Petroleum*, which gave the same full faith and credit to workers' compensation awards as to all other state court judgments.<sup>239</sup>

3. Thomas: *An Evaluation*.<sup>240</sup>—Justice White provided the most practical solution to the workers' compensation problem. All nine members of the Court agreed that *McCartin* rested on a "questionable foundation."<sup>241</sup> Yet *McCartin* may be an adequate answer to the narrow question of the interstate recognition of workers' compensation awards. Surely the question of interstate recognition of workers' compensation awards is an issue that it is more important to settle than to settle correctly. On this narrow view of the problem, *McCartin* is an almost perfect answer. It is limited in scope, easy to understand, and difficult to over-generalize, unlike the plurality opinion in *Thomas*. Further, unlike the dissent in *Thomas*, it does not entail the dislocations that typically accompany the overhaul of a thirty-year-old rule.<sup>242</sup>

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236. *Id.* (Rehnquist, J., dissenting).

237. *Id.* at 295-96 (Rehnquist, J., dissenting).

238. *Id.* at 296 (Rehnquist, J., dissenting).

239. *Id.* (Rehnquist, J., dissenting).

240. See Stewart E. Sterk, *Full Faith and Credit, More or Less, to Judgments: Doubts about Thomas v. Washington Gas Light Co.*, 69 GEO. L.J. 1329 (1981) (commenting on the *Thomas* decision).

241. *Thomas*, 448 U.S. at 289 (White, J., concurring).

242. It is doubtful, however, whether overruling the *McCartin* rule would cause any dislocations simply because it is unlikely that anyone ever has relied on it.

As a solution to the broad problem of the conflict between granting full faith and credit to F-1 judgments and protecting the important policy interests of F-2, however, *McCartin* is totally inadequate. Nevertheless, it may be that solving the larger problem is not so crucial. The question has arisen so far only in a few areas, and the individual solutions in those areas seem to be adequately understood and narrowly limited.<sup>243</sup> Perhaps it is better to settle for individual solutions than to search for a broad subsuming principle that can be easily misunderstood or over-generalized. The individual solution in the workers' compensation cases, however, rests on an unprincipled distinction because these cases cannot be distinguished on a reasoned basis. To those who believe the law should not countenance such anomalies,<sup>244</sup> only the *Thomas* dissent provides an acceptable solution.

Section 103, of course, is an ambitious attempt to solve the larger problem of protecting F-2's interests, and support for its position has grown since the plurality opinion in *Thomas* was published. Notwithstanding the increase in support for the Section 103 position, its advocates can look for unequivocal support from the Supreme Court in only one majority opinion<sup>245</sup> and one plurality opinion.<sup>246</sup> Moreover, the majority opinion in *Williams II* was written half a century ago, and its authority has been undercut severely by subsequent cases that radically restrict the opportunities for collateral attack upon an F-1 divorce.<sup>247</sup> Furthermore, many of the cases that appear to support the interest-balancing language in *Williams II* can be explained by the Supreme Court's concern for the interests of absent parties, rather than by its concern for the interests of F-2.<sup>248</sup>

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243. For cases in those few areas see *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945) (discussed *supra* text accompanying notes 167-168, 170-174); *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) (discussed together *supra* text accompanying notes 175-179); *May v. Anderson*, 345 U.S. 528 (1953) (concerning domestic relations; discussed *supra* text accompanying notes 180-183); *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947) (concerning workers' compensation; discussed *supra* text accompanying notes 192-202); and cases cited *supra* note 166 (concerning injunctions).

244. I count myself in that group.

245. *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945).

246. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

247. See *Cook v. Cook*, 342 U.S. 126 (1951) (placing a heavy burden of proof on an attack of an F-1 decree); *Johnson v. Muelberger*, 340 U.S. 581 (1951) (denying a challenge to F-1's jurisdiction in an F-2 action because the jurisdictional attack was *res judicata* in F-1); *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (refusing a collateral attack in F-2 upon an F-1 decree because defendant had fully participated in the F-1 proceedings).

248. *E.g.*, *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *May v. Anderson*, 345 U.S. 528 (1953).

Finally, it is tempting to dismiss the workers' compensation cases, *McCartin* and *Thomas*, as result-oriented decisions born of the Court's desire to protect the injured worker at all costs. Although the case for Section 103 today is stronger than it was before *Thomas*, it still is based on two isolated, atypical lines of authority.<sup>249</sup> To formulate an entire theory of exceptions to full faith and credit based upon such limited authority seems to be a classic case of allowing the tail to wag the dog. In other words, the Iron Law of Full Faith and Credit still stands strong.<sup>250</sup>

Finally, Section 103 lacks a policy basis. Any judgment rendered by an American court must comply with constitutional requirements. By definition, a judgment complying with constitutional requirements satisfies our basic fairness and policy norms. It is difficult, therefore, to understand how a policy objection to a judgment could *ever* overcome the mandate of the Full Faith and Credit Clause.

#### CONCLUSION

The Iron Law of Full Faith and Credit carries out the Framers' hope that each state will respect the judgments rendered by the other states in the union. The Iron Law permits one bite—but only one—at the questions raised by the litigation, including jurisdiction. Other limits on the Iron Law can be found in the Rule of Reciprocity, which provides that the effect of the judgment is determined by limits in the rendering state, and by a Very Limited Rule dealing with judicial competence and some forms of personal judgments. Although some authority exists for a public policy exception, the purpose of the Iron Law of Full Faith and Credit should not permit any limitation based on public policy grounds.

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249. See *supra* note 166 (containing the injunction cases, which may furnish another line of support for § 103, but none of these cases has been heard by the Supreme Court).

250. But see *Bartlett v. Dumaine*, 523 A.2d 1, 15 (N.H. 1986) (citing Section 103 and holding that the court should not exercise jurisdiction over a trust, observing that the Massachusetts courts "would consider a decision by this court . . . as improper interference with the Commonwealth's important interests."); see also *In re Marriage of Verbin*, 595 P.2d 905 (Wash. 1979) (refusing to enforce a Maryland custody order, citing Section 103 and "public policy" as one reason for its action).