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THE CONSTITUTION AND PRECLUSION/RES JUDICATA

Allan D. Vestal*

THE interrelation of lawsuits is one of the most troublesome, yet least commented upon, areas of the law.¹ The ramifications are great; related lawsuits may be pending concurrently, either brought by the same individual—repetitive litigation²—or brought by different parties—reactive litigation.³ Such lawsuits may occur serially over a period of time. The courts are then faced with problems which have traditionally been discussed in terms of res judicata, bar, merger, or estoppel.⁴ It is impossible to cover the whole area or even a sizable part of it in a single article, but it is feasible to examine one facet which certainly warrants consideration: the constitutional involvement in the interrelation of suits.

Before plunging into the topic, it is necessary to consider the terminology used in the discussion. It seems apparent that the courts and commentators are not happy with the terms now being used.⁵ There is no clarity or definitude in these terms, especially res judicata and estoppel. In recent years the courts have tended to use the term “preclusion” when referring to a situation in which litigation is foreclosed.⁶ To clarify the matter further, in

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¹ See BOWER, *THE DOCTRINE OF RES JUDICATA* (1924); EVEREST & STRODE, *ESTOPPEL* (3d ed. 1923); Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

² See Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960).

³ See Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961).

⁴ In the introductory note to Chapter Three on “Former Adjudication,” it is pointed out that “the term ‘res judicata’ is used . . . in a broad sense as including merger, bar, collateral estoppel and direct estoppel.” RESTATEMENT, JUDGMENTS 160 (1942). When a judgment is in favor of plaintiff, there is a *merger* of the cause of action into the judgment. *Id.* § 47. When the defendant wins on the merits, the judgment acts as a *bar* to plaintiff’s cause of action. *Id.* §§ 48-54. When there is a subsequent controversy on a different cause of action, but involving some of the same questions, *collateral estoppel* prohibits relitigation of matters actually litigated previously. *Id.* §§ 68-72.

⁵ Professor Austin Wakeman Scott, joint Reporter of the *Restatement of Judgments* with Professor Warren A. Seavey, indicated that “It was with some hesitation that we determined to use the term ‘collateral estoppel.’ There is no doubt that the word estoppel is frequently used very loosely. . . . We toyed with the notion of using the term ‘precluded by judgment,’ or of saying that there is a ‘collateral preclusion.’” Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 3 n.4 (1942).

⁶ See, e.g., *Ford v. Ford*, 371 U.S. 187, 194 (1962) (“We hold that the courts of South Carolina were not *precluded* by the Full Faith and Credit Clause from determining the best interest of these children and entering a decree accordingly.”) (Emphasis added.); *Duke v. Durfee*, 308 F.2d 209, 212, 213, 217 (8th Cir. 1962); *Kimmel v. Yankee Lines*, 224 F.2d 644, 646 (3d Cir. 1955); *United States v. Silliman*, 167 F.2d 607, 613 (3d Cir.

this discussion the term *claim preclusion* will be used to indicate a situation in which a claim has been decided conclusively and the matter is not open to further litigation. *Issue preclusion* will be used to describe the situation in which a single issue has been so decided.⁷ It is hoped that these terms will help in analyzing the cases and in reaching meaningful conclusions in the area.

CONSTITUTIONAL INVOLVEMENT

The decision to give or refuse to give preclusive effect to a judgment may involve a number of different constitutional concepts. Certainly four sections of the federal constitution should be considered in any analysis of the general area of preclusion: full faith and credit, due process, the right to trial by jury, and equal protection of the laws.⁸

Full Faith and Credit: Courts Involved

In a federal system such as ours it is possible to have four different situations involving courts of different jurisdictions in which a claim of preclusion is made. The first—preclusive—action may be in either a state or federal court, and the second—in which the claim of preclusion is made—may be in either a state or federal court. This means then that (1) the first and second both may be in state courts, (2) the first may be in a state court and the second in a federal court, (3) the first may be in a federal court and the second in a state court, or (4) both the first and the second may be in federal courts.

The full faith and credit section of Article IV of the Constitution, one of the crucial concepts in this area, states that "Full Faith and Credit shall be given in each State to the public Acts,

1948) ("[A] judgment for the plaintiff in an action against one tortfeasor acting in concert with others does not *preclude* the plaintiff from later suing another.") (Emphasis added.); *Breswick & Co. v. Briggs*, 135 F. Supp. 397, 405 (S.D.N.Y. 1955); *Hassenplug v. Victor Lynn Lines, Inc.*, 71 F. Supp. 70, 72 (E.D. Pa. 1947) ("The doctrine of *res judicata* admittedly *precludes* parties from demonstrating what is or may be the truth.") (Emphasis added.); *Lynch v. Lynch*, 250 Iowa 407, 412, 94 N.W.2d 105, 109 (1959); *Frost v. Frost*, 260 App. Div. 694, 696, 23 N.Y.S.2d 754, 757 (1940) ("The Nevada action could have been defeated by proof that the marriage of the parties was invalid on account of the invalidity of the Mexican decree. Having failed to make proof of that fact in the Nevada action, the plaintiff is *precluded* from litigating the issue now.") (Emphasis added.).

⁷ The phrase "issue preclusion" has not been used by the courts intentionally, but in *Frost v. Frost*, *supra* note 6, the court inadvertently came close, stating "[T]he plaintiff is precluded from litigating the issue now."

⁸ See U.S. CONST. art. IV, § 1 (full faith and credit clause); U.S. CONST. amends. V & XIV, § 1 (due process clauses); U.S. CONST. amend. VII (right to trial by jury clause); U.S. CONST. amend. XIV, § 1 (equal protection under the law clause).

Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." This provision means that when the first suit is in a state court and the second is also in a state court, there is a constitutional requirement of Full Faith and Credit. The constitutional provision, however, does not mention federal courts.

The full faith and credit clause has been supplemented by 28 U.S.C. section 1738, which provides:

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."⁹

Several things should be noted about this statutory provision. First, it encompasses more than just the courts of the states.¹⁰ Second, it provides for the giving of full faith and credit by the federal courts. As the United States Supreme Court has stated, "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts."¹¹ As this statute makes the concept of full faith and credit applicable in federal courts, it can be stated that, when the first suit is in a state court and the second is in a federal court, the requirement of full faith and credit is statutory in origin.¹²

If the first suit is in a federal court and the second is in a state court, what then of the doctrine of full faith and credit? The constitutional provision does not apply; neither does the statutory implementation. However, the United States Supreme Court, in *Stoll v. Gottlieb*, stated:

"The Congress enacted, as one of the earlier statutes, provisions for giving effect to the judicial proceedings of the courts. This has long had its present form. This statute is broader than the authority granted by Article Four, section

⁹ 28 U.S.C. § 1738 (1958).

¹⁰ See *Chittick v. Chittick*, 332 Mass. 554, 126 N.E.2d 495 (1955) (full faith and credit accorded to records in Virgin Islands District Court); *Butler v. Butler*, 179 Misc. 651, 40 N.Y.S.2d 353 (Sup. Ct. 1943) (full faith and credit accorded to Territory of Hawaii).

¹¹ *American Sur. Co. v. Baldwin*, 287 U.S. 156, 166 (1932).

¹² See *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868, 870-71 (1st Cir. 1960); *United States v. Silliman*, 167 F.2d 607, 621 (3d Cir.), *cert. denied*, 335 U.S. 825 (1948).

one, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. Under it the judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances."¹³

The Court concluded that the matter before it entered the federal court under the Bankruptcy Act, and that "effect as *res judicata* is to be given the federal order, if it is concluded it was an effective judgment in the court of its rendition." "The problem before the Supreme Court of Illinois," the Court stated, "was not one of full faith and credit but of *res judicata*."¹⁴ This was a case in which the state supreme court had refused to give effect to a plea of *res judicata* arising from order of a federal bankruptcy court; the United States Supreme Court reversed, holding that the matter was *res judicata*.¹⁵ A number of state decisions have either held or suggested that full faith and credit must be given by state courts to the decisions of federal courts,¹⁶ but these decisions do not seem to be too well considered.

The fourth possibility is the situation in which both the first and second courts are federal. What then of the concept of full faith and credit? Is there any such requirement—constitutional or statutory—as between federal courts? In *Caterpillar Tractor Co. v. International Harvester Co.*¹⁷ the question of the effect to be given a judgment of one federal court in a second federal court was raised. The court, considering the matter at length, reasoned as follows:

"On the one hand it may be urged that the question is essentially one of faith and credit. The extent of the collateral consequences of a judgment is a matter of law and, in the absence of a statute, judge made law. . . . [T]he question of the effect of the prior judgment is to be determined in the first instance by the law of [the state] where the court rendering it sat. A judgment rendered by a federal court is entitled to the same faith and credit as one rendered by the court of the

¹³ 305 U.S. 165, 170 (1938). See *Embry v. Palmer*, 107 U.S. 3, 9 (1882); *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 134 (1874).

¹⁴ *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938).

¹⁵ *Stoll v. Gottlieb*, *supra* note 14, *reversing* *Gottlieb v. Crowe*, 368 Ill. 88, 12 N.E.2d 881 (1938).

¹⁶ See *Chittick v. Chittick*, 332 Mass. 554, 126 N.E.2d 495 (1955); *Butler v. Butler*, 179 Misc. 651, 40 N.Y.S.2d 353 (Sup. Ct. 1943); *Garvin v. Garvin*, 302 N.Y. 96, 103, 96 N.E.2d 721, 724 (1951) (dictum).

¹⁷ 120 F.2d 82 (3d Cir. 1941).

state where it is sitting. . . . While the constitutional mandate of full faith and credit (Art. IV § 1) is applicable to the states only, the federal statute requires faith and credit 'in every court within the United States.' The credit which this judgment must receive is that to which it is entitled 'by law or usage' in the courts of the place where rendered. That is a matter of the common law of [the state where the federal court sat], but is a matter which has not, so far as we have been able to find, been dealt with by [such] courts. In the absence of contrary local decisions the rule set out above is the one we believe to be sound and to which we give our approval."¹⁸

The court cites *Erie R.R. v. Tompkins*¹⁹ in connection with this argument. It is hard to believe that the relationship between federal courts is to be decided by state law; rather, one would believe that this is a purely federal matter to be governed by federally developed principles.²⁰

The court in the *Caterpillar* case further stated:

"On the other hand, the matter here is one between two courts of the same sovereignty, the United States of America. If one federal court failed to give effect to the judgment of another federal court the Supreme Court of the United States, as the head of the judicial system of the United States would compel it to do so because 'they are many members yet but one body'. . . . Whichever route one travels he reaches the same destination. . . . Judge Biggs believes that the problem discussed in the preceding paragraphs presents no problem of faith and credit and that the recognition in one federal court of the decrees of another comes through the fact that both courts are arms of the same sovereignty."²¹

The impact of full faith and credit on successive suits, therefore, may be summarized as follows: (1) if both suits are in state courts, the constitutional mandate covers the situation; (2) if the first is in a state court and the second in a federal court, the statutory provision clearly covers; (3) if the first action is in a federal court and the second in a state court, full faith and credit does not apply, but the problem is one of res judicata; (4) if both suits are in the federal courts, the better view is that the matter is not

¹⁸ *Id.* at 85-86.

¹⁹ 304 U.S. 64 (1938).

²⁰ See Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248 (1963).

²¹ *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F.2d 82, 86 (3d Cir. 1941).

one of full faith and credit, but that recognition must be given because "both courts are arms of the same sovereignty."

It should also be noted that the constitutional concept of full faith and credit does not apply to judgments handed down by the courts of foreign countries. The general concept of preclusion may be applicable or some version of comity may control, but these do not rise to the stature of a constitutional principle.²²

Full Faith and Credit: Doctrine

Simply stated, the full faith and credit concept requires that the judgment handed down in State *A* be given the same effect in State *B* that it would have been given in State *A*. This concept means that if an action has been maintained in one state and a second suit is brought in a second state involving the same issues, the Constitution requires the giving in the second state of the same preclusive effect to the judgment rendered in the first suit that it would have been given in the first state. The second court has no discretion in the matter; it is bound so to respect the decision rendered by the first court. This means that the same preclusive effect must be given in terms of issue preclusion, claim preclusion, the parties or persons covered, and the issues involved.²³ The entire body of law which has developed in the first state concerning the preclusive effect given to judgments must be applied.

There is reason to believe that the requirements of full faith and credit do not end with this incorporation of the law of the first state. On occasion the Supreme Court has held that the doctrine applies in situations where the party to be bound was not at all connected with the first suit. For example, in *Williams v. North Carolina*, the first *Williams* case,²⁴ the Court held that the state of North Carolina was bound by the judgment rendered between private litigants in Nevada. In *Magnolia Petroleum Co. v.*

²² *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185 (1912) (full faith and credit clause inapplicable to judgments of foreign states); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) where the court stated: "'Comity' in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." See also Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962).

²³ See *In re Potts*, 142 F.2d 883, 888-89 (6th Cir. 1944); *Maager v. Hoyer*, 122 F. Supp. 932, 934 (E.D.N.C. 1954); *Butler v. Butler*, 253 Iowa 1084, 1106, 114 N.W.2d 595, 608 (1962); *Phillips v. Cooper*, 253 Iowa 359, 363, 112 N.W.2d 317, 319 (1961).

²⁴ 317 U.S. 287 (1942).

*Hunt*²⁵ the Supreme Court held that the doctrine of full faith and credit applied although the parties were different from those in the first action and were not in privity. The dissent called attention to this fact.²⁶ In *Standard Oil Co. v. New Jersey*²⁷ the opinion indicated that the party from whom the property was taken by escheat would be protected by the full faith and credit clause even against another state which might try to reach the property. This latter state, of course, would not have been a party to the first suit. The Court stated:

"The debts or demands represented by the stock and dividends having been taken from the appellant company by a valid judgment of New Jersey, the same debts or demands against appellant cannot be taken by another state. The Full Faith and Credit Clause bars any such double escheat."²⁸

On the other hand, the Court, in referring to full faith and credit in the second *Williams* case,²⁹ concluded:

"But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders."³⁰

How broad, then, is the impact of the full faith and credit

²⁵ 320 U.S. 430 (1943).

²⁶ See *id.* at 453, where Black, J., stated in his dissenting opinion that: "In the instant case the situation is entirely different. The parties are not the same; the issues are not the same; and the two proceedings are not under the same Act. . . . The employer was not a party to that proceeding; nor was there 'privity' between the insurer and the employer since the insurer's liability did not extend to rights which the employee might have against his employer under Louisiana law." See Cheatham, *Res Judicata and the Full Faith Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330, 349 (1944), where the author points out that the opinion of the minority was silent "on the test to be employed in determining privity under the full faith and credit clause."

²⁷ 341 U.S. 428 (1951).

²⁸ *Id.* at 443. See *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961). The *Western Union* case involved an attempt by the state of Pennsylvania to require that unclaimed obligations of the defendant escheat to the state. Justice Black, in holding for the defendant, stated: "[W]hen a state court's jurisdiction purports to be based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment. . . . Western Union was not protected by the Pennsylvania judgment, for a state court judgment need not be given full faith and credit by other States as to parties or property not subject to the jurisdiction of the court that rendered it." *Id.* at 75.

²⁹ *Williams v. North Carolina*, 325 U.S. 226, *rehearing denied*, 325 U.S. 895 (1945).

³⁰ *Id.* at 230.

clause? Clearly, the parties and certain related individuals may be bound.³¹ Beyond these, however, others may be required to give full faith and credit to a judgment with which they have had no connection. Determining who is included in this group is extremely difficult. This problem might arise where a judgment was handed down in one forum but was not given preclusive effect in that forum vis-à-vis the person who wished to attack the judgment.³² This might involve a person who was not a party and therefore not bound. In this situation—where it is not given preclusive effect in the first forum—it might be urged that it should be given preclusive effect vis-à-vis the party raising the issue in the second. The Court has not clearly faced the question, much less indicated any sort of a solution to this problem. Obviously the Court will have to face this matter at some time and attempt to formulate a rationale to give meaning and predictability to the area. Up to the present time, however, there is no clear indication of the way the Court will eventually settle the matter of the reach, person-wise, of the full faith and credit clause. The best that can be said is that, when the requirements of the federal system demand it, the Court can apply the full faith and credit clause to litigants not normally bound by a prior judgment. This may entail an expansion of the full faith and credit clause to give preclusive effect greater than that found in the state in which the judgment is rendered. It is entirely possible that the Court might decide that the cause of federalism or nationalism requires that a certain judgment be given more preclusive effect than it might normally receive. The Constitution would seem to allow this sort of expansion when necessary. This, seemingly, is the message of those cases which would expand the preclusiveness beyond the scope which usually attaches to such judgments.³³

It should be clearly understood that the full faith and credit statute—28 U.S.C. section 1738³⁴—is not limited to claim preclusion; its reach is much greater than that.³⁵ In applying the constitutional provision and the statute enacted to carry it out, one federal court has stated:

³¹ The author presently intends to deal in a subsequent article with the problem of what persons may be precluded even though they were not parties to or did not participate in the prior suit.

³² See note 28 *supra*.

³³ See text accompanying notes 24-30 *supra*.

³⁴ 28 U.S.C. § 1738 (1958).

³⁵ See *Chicago, R.I. & Pac. R.R. v. Schendel*, 270 U.S. 611 (1926); *Everett v. Everett*, 215 U.S. 203 (1909).

"[W]e think the conclusion inescapable that the decree must have the same effect when relied upon in the court of another state. The full faith and credit clause 'compels that controversies be settled so that where a state court has jurisdiction of the parties and subject matter the judgment controls in other states to the same extent as it does in the state where rendered.' Therefore, this decree prevents the litigation of a matter already determined in New York in the courts of another state for the collateral estoppel division [issue preclusion] of res judicata is included within that clause."³⁶

As to courts in different states in the United States, the case-made law of preclusion is altered by the constitutional concept of full faith and credit. This is primary. The forum court cannot apply solely its own idea of preclusion; rather it must, under the Constitution, look to the state handing down the first decision and find what its doctrine of preclusion is as to the matter involved and apply that law as a *minimum*. The law of the state where the first judgment is handed down controls on the matter of preclusion to this extent. This the Constitution requires.³⁷ If the forum court wishes to give additional preclusive effect to the judgment rendered in the foreign jurisdiction, this may be permissible. At this point due process may come into play.³⁸

The most recent statement by the Supreme Court on the matter of full faith and credit is found in *Ford v. Ford*.³⁹ In a unanimous decision, it was held that a South Carolina court was not bound by an order rendered by a court in Virginia in an earlier proceeding. The Virginia order had recited that the parties had agreed concerning the custody of their children. In the South Carolina action brought some nine months after the termination of the earlier suit the wife brought an action to get full custody of the children. The husband pleaded among other things the defense that plaintiff had "violated the Order of the Court of record in Richmond, Virginia." The trial court held for the plaintiff-mother and rejected the husband's argument that the order of dismissal was res judicata as to the matter. The Supreme Court of South Carolina reversed and held that, since the wife would have been bound by the Virginia judgment in a Virginia court, she would be bound in the South Carolina proceeding. The court

³⁶ *United States v. Silliman*, 167 F.2d 607, 620-21 (3d Cir.), *cert. denied*, 335 U.S. 825 (1948).

³⁷ See section dealing with the limitations on full faith and credit *infra*.

³⁸ See section dealing with the due process clause *infra*.

³⁹ 371 U.S. 187 (1962).

felt that this was an application of the full faith and credit clause. The Supreme Court of the United States, in reversing, stated:

"Whatever the effect given such dismissals where only private interests of parties are involved, cases involving custody of children raise very different considerations. We are of the opinion that Virginia law, which does not treat a contract between the parents as a bar to the court's jurisdiction in custody cases, would similarly not treat as *res judicata* the dismissal in this case. . . .

"[W]e do not believe that, in view of Virginia's strong policy of safeguarding the welfare of the child, a court of that State would consider itself bound by a mere order of dismissal where, as here, the trial judge never even saw, much less passed upon, the parents' private agreement for custody and heard no testimony whatever upon which to base a judgment as to what would be best for the children.

"We hold that the courts of South Carolina were not precluded by the Full Faith and Credit Clause from determining the best interest of these children and entering a decree accordingly."⁴⁰

It should be noted that the South Carolina Supreme Court had treated the matter as one of full faith and credit, and the Supreme Court of the United States said simply that the courts of South Carolina were not precluded by that clause from "determining the best interest of these children and entering a decree accordingly." This is not to say that the courts of South Carolina could not give preclusive effect to a Virginia judgment; it is only saying that the full faith and credit clause does not require the giving of such preclusive effect. The former is a matter of South Carolina law; the latter is a constitutional matter which incorporates Virginia law.

Full Faith and Credit: Judgment Not on Merits

Where a precluding judgment not actually decided on the merits has been handed down in one jurisdiction, a litigant may attempt to raise the same claim in a second jurisdiction. For example, a plaintiff may voluntarily dismiss an action twice in one jurisdiction with a two-dismissal rule;⁴¹ or a defendant may fail to assert a compulsory counterclaim.⁴² What effect will these deci-

⁴⁰ *Id.* at 192, 194.

⁴¹ See FED. R. CIV. P. 41(a)(1).

⁴² See FED. R. CIV. P. 13(a).

sions—in which the merits of the claims were not reached—have upon later actions brought in different jurisdictions? Does the full faith and credit clause require that the second court recognize the decision of the first as precluding further litigation of the matter? It would seem that the clause requires the second court to give the same effect to the judgment that it would have had in the first jurisdiction.⁴³ In the first it would have had a preclusive effect, so it should have such an effect in the second. This should be true in the cases of both examples: the two-dismissal rule⁴⁴ and the compulsory counterclaim provision.⁴⁵

Limitations on Full Faith and Credit

The concept of full faith and credit is subject to certain exceptions or limitations. These might be listed as (1) a jurisdictional limitation, (2) a limitation based upon the policy of the forum state, and (3) the limitations inhering in the first judgment.

If the first judgment is rendered by a court that does not have jurisdiction over the precluded party and this issue has not been litigated in the first proceeding, then the judgment is void and of no preclusive effect, and full faith and credit need not be given to such a judgment. The Supreme Court, in *Hansberry v. Lee*, reiterated this principle:

“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States . . . prescribe”⁴⁶

⁴³ See text accompanying note 21 *supra*.

⁴⁴ See Commentary, The “Two-Dissmissal” Rule, 4 FED. RULES SERV. 41a.123, at 927 (1941); 5 MOORE, FEDERAL PRACTICE ¶ 41.04 (2d ed. 1951). *Contra*, Missouri Pac. Transp. Co. v. Talley, 199 Ark. 835, 136 S.W.2d 688 (1940). In referring to the *Missouri Pacific* decision the Commentary, *supra*, stated: “The Arkansas Supreme Court . . . dismissed [the contention that two prior dismissals in the federal court were res judicata and a bar to the state court action] on the seemingly untenable ground that Rule 41a did not make such dismissals an adjudication on the merits. Certiorari was prayed for on the theory that Rule 41a was a ‘law of the United States’ within the meaning of Article VI, § 2 of the Constitution, and was controlling on state courts; but unfortunately the petition was dismissed on motion of the petitioner.”

⁴⁵ See *United States v. Eastport S.S. Corp.*, 255 F.2d 795 (2d Cir. 1958) (failure of Government to plead claim for charter hire as a compulsory counterclaim in prior action before Court of Claims bar to instant suit before Court of Appeals); *Reconstruction Fin. Corp. v. First Nat'l Bank*, 21 FED. RULES SERV. 13a.3, Case 1 (D. Wyo. May 13, 1955); *E. J. Korvette Co. v. Parker Pen Co.*, 21 FED. RULES SERV. 13a.11, Case 3 (S.D.N.Y. April 23, 1955).

⁴⁶ 311 U.S. 32, 40-41 (1940).

Of course, if when the matter was litigated between the parties the court erroneously held that it had jurisdiction, then the judgment handed down in all probability⁴⁷ cannot be collaterally attacked in the second jurisdiction. The erroneous ruling must be directly attacked by appeal or in the court making the ruling.⁴⁸

It should be noted, however, that in the opinion of some courts the jurisdictional matter is so fundamental as to override the concept of full faith and credit in some circumstances. Recently, the Court of Appeals for the Eighth Circuit stated in *Duke v. Durfee*:⁴⁹

"[T]he full faith and credit clause, while foreclosing repetitious litigation of non-jurisdictional matters, does not preclude a second forum's inquiry into questions of the first court's personal or subject-matter jurisdiction. This was the holding of several early Supreme Court cases. The principle was comprehensively restated in the usually cited case of *Thompson v. Whitman*, 1874, 85 U.S. (18 Wall.) 457, 469 . . . and has been perpetuated by later cases. . . . Thus, there is no full faith and credit requirement that, in the case before us, a Missouri court—and thereby the federal district court in Missouri . . .—must accept the Nebraska judgment as final."⁵⁰

This seems to suggest that the full faith and credit doctrine must give way to a re-examination of the jurisdictional basis of the first action. It should be noted that this decision runs contrary to the great weight of authority on the matter of issue preclusion involving jurisdiction.⁵¹ The decision stands almost alone as to full faith and credit and preclusion of the jurisdictional issue.⁵²

Under some circumstances the policy of the forum state may be so strong on a particular point that it may be able to avoid the

⁴⁷ See *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868, 871 (1st Cir. 1960), where the court stated: "Due process does not give parties the right to litigate the same question twice. . . . [T]he principle that there shall be but one adjudication of an issue between the same parties covers the issue of jurisdiction over a defendant's person, provided the court first deciding that issue . . . did not make so gross a mistake as to be impossible 'in a rational administration of justice.'" But see *Duke v. Durfee*, 308 F.2d 209 (8th Cir. 1962) (discussed *infra*).

⁴⁸ See *Davis v. Davis*, 305 U.S. 32 (1938) (collateral attack denied in another state court); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931) (collateral attack denied in another federal court).

⁴⁹ *Duke v. Durfee*, 308 F.2d 209 (8th Cir. 1962), *cert. granted*, 371 U.S. 946 (1963), 63 COLUM. L. REV. 353 (1963), 37 TUL. L. REV. 335 (1963), 49 VA. L. REV. 180 (1963).

⁵⁰ *Id.* at 212.

⁵¹ See *Jackson v. Irving Trust Co.*, 311 U.S. 494, 503 (1941); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939); *Stoll v. Gottlieb*, 305 U.S. 165, 171-73 (1938); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403 (1940) (dictum).

⁵² The reasonable prediction as to the final determination of the *Duke* case would appear to be a reversal by the Supreme Court on certiorari.

doctrine of full faith and credit and refuse to honor the judgment handed down in the first state. The United States Supreme Court has suggested this possibility in *Magnolia Petroleum Co. v. Hunt*,⁵³ where the court stated:

“Even though we assume for present purposes that the command of the Constitution and the statute is not all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, this Court is the final arbiter of the extent of the exceptions. . . . And we pointed out in *Williams v. North Carolina* . . . that ‘the actual exceptions have been few and far between. . . .’ ”⁵⁴

*Williams*⁵⁵ is the definitive case as to allowing collateral attacks on judgments contrary to the general principle of full faith and credit. The Supreme Court stated:

“It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. . . . But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders.”⁵⁶

The Court held that North Carolina was not required to yield “her State policy” and need not give full faith and credit to the Nevada decree.

It can be foreseen that in a number of different situations a state’s policy may be so overriding in importance that a judgment of another state will not be given preclusive effect. Rather, the forum state will proceed to re-examine the matter in light of the forum’s policy.⁵⁷

⁵³ 320 U.S. 430 (1943).

⁵⁴ *Id.* at 438.

⁵⁵ *Williams v. North Carolina*, 325 U.S. 226, *rehearing denied*, 325 U.S. 895 (1945).

⁵⁶ *Id.* at 230.

⁵⁷ The re-examination by the forum state is not limited to the area of judgments, as in the second *Williams* case. It is helpful to observe how the forum re-examines statutes. See *Alaska Packers Ass’n v. Industrial Acc. Comm’n*, 294 U.S. 532 (1935). In this case the California forum allowed a seasonal worker who was contracted in California but injured in Alaska to recover workman’s compensation under the California statute even though the worker contracted to recover under the Alaska statute. After studying the various

Finally, it must be understood that the judgment first handed down, even if valid, is subject to all of the limitations which inhere in such a judgment in the state rendering it. If it is subject to attack in the rendering state, it is subject to the same attack in the forum state in the second action. This becomes particularly apparent in the child custody⁵⁸ and divorce cases. If the first court has the power to re-examine the matter and reopen the case, the forum has the same power.

The question of the effect to be given a judgment was posed in *Maager v. Hoye*,⁵⁹ where a plaintiff started a second action which completely paralleled a prior suit brought in a different state. The second court held that the first judgment was a bar to the action. Referring to the full faith and credit clause, the court stated:

"[W]hen the judicial proceedings of one state are drawn in question before the courts of another state, their regularity and validity are to be determined, not by the law of the forum, but by the law of the state in which the judgment was rendered; and . . . the judgment of a sister state must be given full faith and credit where the court of that state had jurisdiction and no extrinsic fraud was shown. Thus, Virginia law [the first forum] is determinative of the questions presented in this action."⁶⁰

It is true, though, that if the judgment could be attacked in the first state because of fraud involved in the first proceeding then

conflicting policies, Justice Stone stated: "In the special circumstances disclosed, the state [California] had as great an interest in affording adequate protection to this class of its population as to employees injured within the state." *Id.* at 543. "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause. . . ." *Id.* at 547-48. See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 7-10 (1945), where the Justice categorizes qualifications on the full faith and credit clause as follows: (1) where the forum may inquire into the jurisdiction of the rendering court, (2) where the forum's statute of limitations on a suit upon a judgment is applied, (3) where the doctrine of forum non conveniens allows the forum not to provide a remedy on a former judgment of a sister state if both parties are foreign corporations, and (4) where the forum looks into the prior judgment and refuses to enforce it if it is based upon a penalty.

⁵⁸ See *Kovacs v. Brewer*, 356 U.S. 604 (1958) (remanded to consider whether there was a change in circumstances which would allow the forum not to be bound by a sister state's decree concerning child custody); *State ex rel. Girtman v. Riketsen*, 221 La. 691, 60 So. 2d 88 (1952) (same).

⁵⁹ 122 F. Supp. 932 (E.D.N.C. 1954).

⁶⁰ *Id.* at 934.

it can be attacked in the second jurisdiction, and there is no violation of full faith and credit.

Due Process

Due process in the adjudicatory process involves the reasonableness of the court's procedure under the circumstances and not the nature of the action taken by the court. It is true, however, that due process to some extent controls the substantive law applied and the reasonableness of the action taken. In one isolated case, *Western Union Co. v. Pennsylvania*,⁶¹ the Supreme Court has talked in terms of the due process clause when considering the effect of the judgment handed down and has stated that due process requires that the first judgment have a total preclusive effect. The Court stated that anything less than total protection for the losing defendant would violate the due process clause. In this case, which involved the escheat statute of the state of Pennsylvania, the Court concluded:

"[W]hen a state court's jurisdiction purports to be based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."⁶²

Perhaps this is a reasonable rule in the case of escheat statutes because of their particular difficulties.⁶³ But this language is not

⁶¹ 368 U.S. 71 (1961). The law reviews have noted this case extensively. The best comments are found in *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54, 132 (1962) and 62 COLUM. L. REV. 708 (1962).

⁶² *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961). See note 28 *supra*.

⁶³ See text accompanying notes 27-28 *supra*. See also *Security Sav. Bank v. California*, 263 U.S. 282 (1923) (statutory provisions held sufficient under due process). The pressing problem in the escheat area is the possibility or probability that several states may claim the same property. The first consideration of this is found in *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 443 (1951), where the Court suggested that the first judgment of escheat would bar other states if they attempted to claim the property through escheat. The court suggested that full faith and credit would require this result. This interesting idea is found in the following language of that opinion:

"[W]e consider the notice to the stockholders adequate to support a valid judgment against their rights as well as those of the Company. The *res* is the debt and the same rule applies as with tangible property. The debts or demands represented by the stock and dividends having been taken from the appellant company by a valid judgment of New Jersey, the same debts or demands against appellant cannot be taken by another state. The Full Faith and Credit Clause bars any such double escheat." *Id.* at 443.

The court then went ahead to suggest that the conflict between states might be resolved in the Supreme Court. In *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75-76 (1961), Mr. Justice Black attempted to distinguish the *Standard Oil* case, but the attempt does not seem to have been wholly successful.

limited to such statutes and seems to be of general application. Consider the situation of an action of replevin brought in a state court. Need the plaintiff give the defendant assurances that the judgment will protect him against any other claims based upon the property? Traditionally, the sole issue has been the relative strengths of the claims of the plaintiff and defendant. There is always a possibility that there is a third person who may have some claim in connection with the property that he may be able to assert against the first defendant. The decision in the first suit has nothing to do with any other claim which may be asserted. Certainly the defendant, if he loses, is forced to "relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."⁶⁴

In our adversary system, the courts normally adjudicate the relative merits of the claims of the parties involved and do not consider the rights of other individuals who possibly have some sort of claim which they may be able to assert at some time in the future. Certainly the courts do not require any sort of assurance that the losing party will not be subjected to other suits by other claimants. The Federal Interpleader Act⁶⁵ was designed to minimize the possibility of multiple claims and multiple liability against a single party. But the act itself is a recognition of the possibility that, absent the act, there might be multiple claims and multiple liability.

It would seem that the recent statement by the Supreme Court should be limited to the escheat situation, and that it would be a mistake to extend the language of the opinion to other situations. The winning party wins because of his superior claim; he does not speak for others and need not assure the losing party that he will not be held liable in another suit. Due process does not require any assurances of immunity from suit; it does not require that preclusive effect against subsequent liability be a concomitant to the judgment handed down.

Where the claim of preclusion is raised in a second suit, the constitutional concept of due process may come into play. The supposedly precluded party may claim that his constitutional rights have been violated—that he has not received due process. In other words, the claim is that the preclusion is a violation of due process.

⁶⁴ See *Western Union Tel. Co. v. Pennsylvania*, *supra* note 63, at 75.

⁶⁵ 28 U.S.C. § 1335 (1958).

If, for example, an action is maintained in one jurisdiction and a second suit involving the same issues is then brought between the same parties in a second jurisdiction, the preclusive effect of the first judgment may involve the concept of due process. Will due process ever require the re-examination of an issue in the second court, that is, bar the giving of preclusive effect to the first judgment? Suppose that the first court has made a mistake in the first judgment, can it still be given preclusive effect? Suppose that the mistake is one concerning the jurisdiction of the court, is there still preclusion? Suppose the first is a default judgment, can the second court hold that there is issue preclusion? These are questions that ultimately may be resolved only in terms of the Constitution.

The Supreme Court has approached these problems in the following terms:

“[W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.”⁶⁶

This language suggests the approach to be used in a situation involving the problem posed. The way this might come before a court is suggested in *Ford v. Ford*,⁶⁷ recently decided by the Supreme Court. Concluding the opinion, the Court stated, “We hold that the courts of South Carolina were not precluded by the Full Faith and Credit Clause from determining the best interest of these children and entering a decree accordingly.”⁶⁸ The Court indicated only that the South Carolina courts were not bound by the prior judgment in Virginia. This left open the question as to whether South Carolina *could* give preclusive effect to the Virginia judgment. Thus the due process argument may arise. Here the precluded party may claim that his constitutional rights have been violated if the first judgment is considered preclusive.

If the first court was without jurisdiction over the defendant, the action of the first court is without basis. The second court cannot give effect to the judgment so rendered. As the Supreme Court

⁶⁶ *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

⁶⁷ 371 U.S. 187 (1962).

⁶⁸ *Id.* at 194.

stated in *Hansberry v. Lee*,⁶⁹ "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."⁷⁰ This means that due process bars the execution of such a judgment on property of the individual and that the judgment can have no preclusive effect against the individual in subsequent actions. It is not completely accurate, however, to say that only parties are bound by a judgment. Authorities and courts have labored over this matter diligently⁷¹ and have, as yet, not reached any satisfactory conclusion. But it is quite clear that, under certain circumstances, a person who has not been made a party by service of process may be bound by a judgment handed down in the action.⁷² The controlling question is whether it can be said that

⁶⁹ 311 U.S. 32 (1940).

⁷⁰ *Id.* at 40.

⁷¹ See *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1942), where the California Supreme Court, in this landmark decision, observed: "Many courts have stated the *facile formula* that the plea of *res judicata* is available only when there is privity and mutuality of estoppel. . . . Under the requirement of privity, only parties of the former judgment or their privies may take advantage of or be bound by it. . . . A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. . . . The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." (Emphasis added.)

Counteracting this "*facile formula*" is the development of an expanding concept of privity and a narrowing requirement of mutuality. RESTATEMENT, JUDGMENTS § 83, comment *a*, defines "privity" as including "those who control an action although not parties to it; those whose interests are represented by a party to the action; successors in interest to those having derivative claims." It is no wonder that it has been observed that:

"The question of who is concluded by a judgment has been obscured by the use of the words 'privity' and 'privies,' which in their precise technical meaning in law are scarcely determinative always of who is and who is not bound by a judgment. Courts have striven sometimes to give effect to the general doctrine that a judgment is only binding between parties and privies by extending the signification of the word 'privies' to include relationships not originally embraced in it, whereas the true reason for holding the issue *res judicata* does not necessarily depend on privity, but on the policy of law to end litigation by preventing a party who as had one fair trial of a question of fact from again drawing it into controversy." *Coca Cola Co. v. Pepsi-Cola Co.*, 36 Del. 124, 133, 172 Atl. 260, 263 (1934).

Flowing from the *Coca Cola* and *Bernhard* cases is the idea that due process does not restrict the right to assert a plea of preclusion to one who was either a party or in privity with a party to the earlier litigation. See *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, *supra* at 812, 122 P.2d at 894.

Since the facts in both *Coca Cola* and *Bernhard* involved factual situations in which the party being bound in the second suit asserted the initiative in both suits as plaintiff, the interesting question is whether due process will permit an expansion of the concept of focusing upon the party being bound, so that there is privity in situations (1) where the party being bound in the second suit was a defendant in the first suit and plaintiff in the second or (2) where the party being bound was a defendant in both suits. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

⁷² See, e.g., *Behrens v. Skelly*, 173 F.2d 715, 718-19 (3d Cir.), *cert. denied*, 338 U.S.

"the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."⁷³ If a class is involved as a defendant, there are obviously certain factors to be considered which are not present if the action is supposedly an action seeking a judgment against persons all actually served. But the protection of due process shelters all litigants in order to assure that they receive fair treatment under the circumstances.

It may be that the decision of the first court is so wrong—so grossly wrong—as to be impossible "in a rational administration of justice."⁷⁴ This suggests that the action of the court is not, in any sense of the word, judicial; that the action is a gross miscarriage of justice. At this point the second court should not, and cannot under the due process concept, give full faith and credit to such a decision. At this point the supposedly precluded party is protected by the constitutional doctrine of due process that guarantees the individual a day in court—something he has not received in the first, precluding suit.

It can therefore be concluded that due process bars the giving of preclusive effect to (1) a judgment rendered by a court without a jurisdictional basis to hand down a judgment against the defendant, or (2) a judgment that is grossly wrong. The Supreme Court stated in *Griffin v. Griffin*:⁷⁵

"A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction [citing cases]. Moreover, due process requires that no other jurisdiction shall give effect, even as a

821 (1949) where the court stated: "Under the rule of privity one who purchases property after a suit has been begun against the vendor with respect to the property purchased is 'chargeable with legal or constructive notice so as to render his purchase subject to the event of that suit' even though he may have no actual knowledge of the suit." See *United States v. Dollar*, 100 F. Supp. 881 (N.D. Cal. 1951), *reversed on other grounds*, 196 F.2d 551 (9th Cir. 1952). Although not a party to the prior action, the Government participated in the defense in order to further its own interest. In holding the Government bound as a privy to the prior suit, the Court stated:

"Due process requires that a person shall have an opportunity to be heard by a court of competent jurisdiction upon a matter which affects his interests. But the gauging of when, in legal contemplation, he has had a day in court is a practical matter which searches reality and shuns form. . . . [T]he reasons for the preclusion of those who have participated in an action are the same as those applicable to parties." *Id.* at 886. See note 79 *infra*.

⁷³ *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). The demands of due process do not put the judicial process in a strait jacket. Rather there is a great deal of flexibility in these demands; the Court has noted that there must be given "a proper regard for divergent local institutions and interest." *Ibid.*

⁷⁴ *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 294 F.2d 868, 871 (1st Cir. 1960). See note 47 *supra*.

⁷⁵ 327 U.S. 220 (1946).

matter of comity, to a judgment elsewhere acquired without due process [citing *Restatement, Judgments*]."⁷⁶

Two categories are established by these principles. First, those judgments which must be given full faith and credit, and second, those judgments, invalid under the due process clause, which cannot be given preclusive effect. But it would seem that there is a third area, a middle ground where (1) full faith and credit does not force the second state to recognize as valid and conclusive a judgment handed down in the first state, and still (2) preclusive effect could be given without violating the due process clause. An example might be a judgment rendered in one state subject to attack in that state. A second state might refuse to allow an attack on such judgment and give preclusive effect to the judgment, not because of full faith and credit, but rather because of comity or *res judicata*. If the proceedings in the first state met the requirements of due process, then certainly the second state court could hold the judgment binding on the parties in that state.

In giving effect to the judgment rendered by the first court, the second court may make an incorrect decision as to the action of the first court. Even if this is clearly wrong, it is not a denial of constitutional rights. The Supreme Court has stated:

"It [the second court] may be mistaken upon what to it is matter of fact, the law of the other State. But a mere mistake of that kind is not a denial of due process of law. . . . Whenever a wrong judgment is entered against a defendant his property is taken when it should not have been, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights."⁷⁷

So a mistake by itself does not raise a constitutional issue, but an egregious error may raise one.

When an attempt is made to extend the concept of preclusion to include more and more individuals,⁷⁸ the due process concept may become even more important. Under this constitutional provision, every individual is entitled to his day in court. Thus the attempt to be more inclusive in the application of the doctrine of preclusion⁷⁹ at some point reaches a constitutional limitation. The

⁷⁶ *Id.* at 228-29.

⁷⁷ *Chicago Life Ins. Co. v. Cherry*, 224 U.S. 25, 30 (1917).

⁷⁸ See notes 71 & 72 *supra* and accompanying text.

⁷⁹ See *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940), where Mr. Justice Stone stated: "It

Constitution requires fair treatment of the parties to be precluded. Anything less is invalid and unconstitutional as a denial of due process.⁸⁰

Right to Trial by Jury

Should two claims be pending in the same federal court between the same parties wherein one claim is at law and the other is in equity, the court theoretically has the option of trying either claim first. Should there be common questions of fact in the two claims, it would follow that the first decision would have a preclusive effect on the common claims. This question arose in *Beacon Theatres, Inc. v. Westover*,⁸¹ decided by the Supreme Court of the United States, wherein the Court stated:

“ ‘In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.’ This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.”⁸²

The attitude of the Supreme Court of the United States toward this right to trial by jury was emphasized in *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*⁸³ wherein the Court stated:

is one thing to say that some members of a class may represent other members in a litigation It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.”

⁸⁰ See *Riley v. New York Trust Co.*, 315 U.S. 343, 354 (1941), where the Court stated that “if the effect of a probate decree in Georgia *in personam* was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process.”

⁸¹ 359 U.S. 500 (1959).

⁸² *Id.* at 510-11. Whether this concept would be applied in all its vigor in state courts in comparable situations cannot be stated. But in light of state constitutional provisions dealing with the right to trial by jury, it is conceivable that state courts might reach the same conclusion. However, to date no state court has cited the *Beacon Theatre* case.

⁸³ 356 U.S. 525 (1958).

"An essential characteristic of . . . [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."⁸⁴

Here the significance of trial by jury was held to be a countervailing consideration against the doctrine of the *Erie* case.⁸⁵ The right to trial by jury was so fundamental that the requirement of uniformity would fall before it. This sanctity of the trial by jury has been most recently reflected in *Simler v. Conner*,⁸⁶ where, in a per curiam opinion, the Court noted that "The federal policy favoring jury trials is of historic and continuing strength."⁸⁷

One might then well consider the situation of a law action pending in a federal court with a comparable action pending on the equity side of a state court, there being some fact issues common to the two actions. Suppose the state court should adjudicate the matter first. Would a federal court be bound by the fact issues decided? Certainly there is no clear-cut answer to the problem, but obviously the federal court will protect the right to trial by jury, and it might well decide that the prior decision in the equity action in the state court was simply a device to circumvent the jury trial. If this were true, it would seem that there would be no preclusion.

The recent Supreme Court cases suggest that in the federal courts the right to trial by jury is so basic that it will be protected against any possible encroachment. Trial order must be such as to protect this right to trial by jury, and preclusive effect will not be given to a roughly contemporaneous equitable decree except under the most unusual circumstances.

Equal Protection of the Laws

The fourteenth amendment to the Constitution provides in section one that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This constitutional limitation might have some application in the area of preclusion

⁸⁴ *Id.* at 537.

⁸⁵ See Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 262-71 (1963) for a discussion of the *Byrd* case in relation to the *Erie R.R.* case.

⁸⁶ 372 U.S. 221 (1963) (right to jury trial in suit against lawyer for charging unreasonable fees in diversity cases determined by federal law).

⁸⁷ *Id.* at 222.

if a state should ever attempt to give certain judgments preclusive effect according to the persons involved. This might well involve a classification of persons which would be unconstitutional under the equal protection clause. The state, of course, can make reasonable classifications based upon some rational criteria.⁸⁸ But there is a line beyond which the states cannot go.

This might become a very real problem where there is divergency in the treatment of judgments. If the forum court decides that a judgment is subject to attack under the full faith and credit provision since the rendering state would allow an attack, this avoids that constitutional matter; but it certainly does not solve all the problems. Suppose the law of the second state would not permit such an attack upon a domestic judgment of the same type. Can the foreign judgment then be so attacked? Or does the equal protection clause require the same treatment, regarding preclusion, of domestic and foreign judgments? This raises some extremely interesting problems.

The distinction between full faith and credit, equal protection, and preclusion was considered in *Camp v. Camp*.⁸⁹ There the New York court was faced with a collateral attack on a Florida divorce decree. The court first considered the Florida law on collateral attacks on such decrees and found that that state would allow such a decree to be set aside. The court stated that "the Full Faith and Credit Clause . . . and sec. 1738 of title 28 of the United States Code . . . permit collateral attack in the forum where such attack would be permitted in the rendering State. . . ."⁹⁰ The New York court examined its own law concerning res judicata

⁸⁸ See *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). In upholding a state statute prohibiting a land owner from pumping on his own land so as to deplete the subterranean mineral supply common to him and other owners, the Court stated that this was not a denial of equal protection of the laws because:

"Each State possesses the general power to prescribe the evidence which shall be received and the effect which shall be given it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be *prima facie* evidence of another fact. Many such exertions of this power are shown in the legislation of several States, and their validity, as against the present objection, has been uniformly recognized save where they have been found to be merely arbitrary mandates or to discriminate invidiously between different persons in substantially the same situation." *Id.* at 81-82.

See *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 35 (1910) (upheld state statute abrogating fellow-servant rule as to all employees of railroad even though many employees were not endangered to the same degree as those in the actual operation of trains); *Adams v. New York*, 192 U.S. 585 (1903) (state statute was not unconstitutional because it provided an exception for "public officers," since the only rational meaning would be to limit the exception to officers of the law).

⁸⁹ 21 Misc. 2d 908, 189 N.Y.S.2d 561 (Sup. Ct. 1959).

⁹⁰ *Id.* at 913, 189 N.Y.S.2d at 566.

and comity and concluded that a collateral attack was permissible under that state's law. It concluded that no constitutional discrimination occurs if New York permits such a Florida decree to be collaterally attacked. The court said specifically on this point:

"[S]ince New York will permit collateral attack upon its own divorce judgments, whether voidable only or absolutely void, . . . no unconstitutional discrimination (U. S. Const. art. IV, § 2 . . .) occurs when New York permits such a Florida decree to be collaterally attacked."⁹¹

The inference is obvious that, had New York not allowed the collateral attack on one of its judgments under the circumstances, the equal protection clause might have limited the power of the state court in permitting such an attack on the Florida judgment. Although this conclusion might not be reached by the court in the future if there should be a classification according to the forum rendering the judgment, it does indicate the general nature of the equal protection limitation: at some point a classification for preclusive purposes may be held unconstitutional as violative of the equal protection provision.

SUMMARY

It must be concluded that there are a number of federal constitutional concepts which are important in the area of preclusion. The fundamentals of the doctrine of preclusion operate in a wide range, it is true, but the Constitution draws certain lines about its impact. In the interest of fairness to the litigants, the Constitution imposes certain due process limitations. The requirement of fair trial under the federal scheme is found also in the protection of the right to trial by jury. The possible involvement of equal protection suggests an interest in the fair treatment of the individuals involved. Finally, the national character is protected by the requirements of full faith and credit.

All of these suggest that, at these junctures, very important considerations become involved. Decisions are arrived at only with great difficulty. An understanding of the principles involved will allow a discussion of the matters in meaningful terms, and will certainly make the resolution of such problems somewhat easier.

⁹¹ *Ibid.*