ARTICLE IV

STATES' RELATIONS

CONTENTS

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

SOURCES AND EFFECT OF FULL FAITH AND CREDIT

Private International Law

The historical background of the Full Faith and Credit Clause is furnished by the branch of private law that is variously termed "private international law," "conflict of laws," and "comity." This branch comprises a body of rules, based largely on the writings of jurists and judicial decisions, in accordance with which the courts of one country, or "jurisdiction," will ordinarily, in the absence of a local policy to the contrary, extend recognition and enforcement to rights claimed by individuals by virtue of the laws or judicial decisions of another country or "jurisdiction." Most frequently applied examples of these rules include the following: the rule that a marriage that is good in the country where performed (*lex loci*) is good elsewhere; the rule that contracts are to be interpreted in accordance with the laws of the country where entered into (*lex loci contractus*) unless the parties clearly intended otherwise; the rule that immovables may be disposed of only in accordance with the law of the country where situated (*lex rei sitae*);[1] the converse rule that chattels adhere to the person of their owner and hence are disposable by him, even when located elsewhere, in accordance with the law of his domicile (*lex domicilii*); the rule that, regardless of where the cause arose, the courts of any country where personal service of the defendant can be effected will take jurisdiction of certain types of personal actions—hence termed "transitory"—and accord such remedy as the *lex fori* affords. Still other rules, of first importance in the present connection, determine the recognition that the judgments of the courts of one country shall receive from those of another country.

[1] Clark v. Graham, 19 U.S. (6 Wheat.) 577 (1821), is an early case in which the Supreme Court enforced this rule.

So, even had the states of the Union remained in a mutual relationship of entire independence, private claims originating in one often would have been assured recognition and enforcement in the others. The Framers felt, however, that the rules of private international law should not be left among the states altogether on a basis of comity and hence subject always to the overruling local policy of the *lex fori*, but ought to be in some measure at least placed on the higher plane of constitutional obligation. In fulfillment of this intent, the Full Faith and Credit Clause was inserted, and Congress was empowered to enact supplementary and enforcing legislation.[2]

JUDGMENTS: EFFECT TO BE GIVEN IN FORUM STATE

In General

Article IV, § 1, has had its principal operation in relation to judgments. Embraced within the relevant discussions are two principal classes of judgments. First, those in which the judgment involved was offered as a basis of proceedings for its own enforcement outside the state where rendered, as for example, when an action for debt is brought in the courts of State B on a judgment for money damages rendered in State A; second, those in which the judgment involved was offered, in conformance with the principle of *res judicata*, in defense in a new or collateral proceeding growing out of the same facts as the original suit, as for example, when a decree of divorce granted in State A is offered as barring a suit for divorce by the other party to the marriage in the courts of State B.

The English courts and the different state courts in the United States, while recognizing "foreign judgments *in personam*," which were reducible to money terms as affording a basis for actions in debt, originally accorded them generally only the status of *prima facie* evidence in support thereof, so that the merits of the original controversy could always be opened. When offered in defense, on the other hand, "foreign judgments *in personam*" were regarded as conclusive upon everybody on the theory that, as stated by Chief Justice Marshall, "it is a proceeding *in rem*, to which all the world are parties."[3] The pioneer case was *Mills v. Duryee*,[4] decided in 1813. In an action brought in the circuit court of the District of Columbia, the equivalent of a state court for this purpose, on a judgment from a New York court, the defendant endeavored to reopen the whole

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[2] Congressional legislation under the Full Faith and Credit Clause, insofar as it is pertinent to adjudication under the clause, is today embraced in 28 U.S.C. §§ 1738–1739. *See also* 28 U.S.C. §§ 1740–1742.

[3] Mankin v. Chandler, 16 F. Cas. 625, 626 (No. 9030) (C.C.D. Va. 1823).

[4] 11 U.S. (7 Cr.) 481 (1813). *See also* Everett v. Everett, 215 U.S. 203 (1909); Insurance Company v. Harris, 97 U.S. 331 (1878).

question of the merits of the original case by a plea of "*nil debet*." It was answered in the words of the first implementing statute of 1790[5] that such records and proceedings were entitled in each state to the same faith and credit as in the state of origin, and that, as they were records of a court in the state of origin, and so conclusive of the merits of the case there, they were equally so in the forum state. The Court found that it had not been the intention of the Constitution merely to reenact the common law—that is, the principles of private international law—with regard to the reception of foreign judgments, but to amplify and fortify these.[6] Some years later, in *Hampton v. McConnell*,[7] Chief Justice Marshall went even further, using language that seems to show that he regarded the judgment of a state court as constitutionally entitled to be accorded in the courts of sister states not simply the faith and credit on conclusive evidence but the validity of final judgment.

When, however, the next important case arose, the Court had come under new influences. This case was *McElmoyle v. Cohen*,[8] in which the issue was whether a statute of limitations of the State of Georgia, which applied only to judgments obtained in courts other than those of Georgia, could constitutionally bar an action in Georgia on a judgment rendered by a court of record of South Carolina. Declining to follow Marshall's lead in *Hampton v. McConnell*, the Court held that the Constitution was not intended "materially to interfere with the essential attributes of the *lex fori*," that the act of Congress only established a rule of evidence—of conclusive evidence to be sure, but still of evidence only; and that it was neces-

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[5] Chap. XI, 1 Stat. 122 ("records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken").

[6] On the same basis, a judgment cannot be impeached either in or out of the state by showing that it was based on a mistake of law. American Express Co. v. Mullins, 212 U.S. 311, 312 (1909). Fauntleroy v. Lum, 210 U.S. 230 (1908); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917).

[7] 16 U.S. (3 Wheat.) 234 (1818).

[8] 38 U.S. (13 Pet.) 312 (1839). *See also* Townsend v. Jemison, 50 U.S. (9 How.) 407, 413–20 (1850); Bank of Alabama v. Dalton, 50 U.S. (9 How.) 522, 528 (1850); Bacon v. Howard, 61 U.S. (20 How.) 22, 25 (1858); Christmas v. Russell, 72 U.S. (5 Wall.) 290, 301 (1866); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 292 (1888); Great Western Tel. Co. v. Purdy, 162 U.S. 329 (1896); Wells v. Simonds Abrasive Co., 345 U.S. 514, 516–18 (1953). Subsequently, the Court reconsidered and adhered to the rule of these cases, although the Justices divided with respect to rationales. Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). Acknowledging that in some areas it had treated statutes of limitations as substantive rules, such as in diversity cases to insure uniformity with state law in federal courts, the Court ruled that such rules are procedural for full-faith-and-credit purposes, since "[t]he purpose . . . of the Full Faith and Credit Clause . . . is . . . to delimit spheres of state legislative competence." Id. at 727.

sary, in order to carry into effect in a state the judgment of a court of a sister state, to institute a fresh action in the court of the former, in strict compliance with its laws; and that, consequently, when remedies were sought in support of the rights accruing in another jurisdiction, they were governed by the *lex fori*. In accord with this holding, the Court further held that foreign judgments enjoy, not the right of priority or privilege or lien that they have in the state where they are pronounced but only what the *lex fori* gives them by its own laws, in their character of foreign judgments.[9] A judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court in another state, as it has in the state in which it was rendered.[10]

A judgment enforceable in the state where rendered must be given effect in another state, notwithstanding that the modes of procedure to enforce its collection may not be the same in both states.[11] If the initial court acquired jurisdiction, its judgment is entitled to full faith and credit elsewhere even though the former, by reason of the departure of the defendant with all his property, after having been served, has lost its capacity to enforce it by execution in the state of origin.[12] "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction, . . . or that it has ceased to be obligatory because of payment or other discharge . . . or that it is a cause of action for which the State of the forum has not provided a court."[13]

On the other hand, the clause is not violated when a judgment is disregarded because it is not conclusive of the issues before a court of the forum. Conversely, no greater effect can be given than

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[9] Cole v. Cunningham, 133 U.S. 107, 112 (1890). *See also* Stacy v. Thrasher, 47 U.S. (6 How.) 44, 61 (1848); Milwaukee County v. White Co., 296 U.S. 268 (1935).

[10] Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887); Hanley v. Donoghue, 116 U.S. 1, 3 (1885). *See also* Green v. Van Buskirk, 74 U.S. (7 Wall.) 139, 140 (1869); Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912); Roche v. McDonald, 275 U.S. 449 (1928); Ohio v. Chattanooga Boiler Co., 289 U.S. 439 (1933).

[11] Sistare v. Sistare, 218 U.S. 1 (1910).

[12] Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913). *See also* Fall v. Eastin, 215 U.S. 1 (1909).

[13] Milwaukee County v. White Co., 296 U.S. 268, 275–276 (1935).

is given in the state where rendered. Thus, an interlocutory judgment may not be given the effect of a final judgment.[14] Likewise, when a federal court does not attempt to foreclose the state court from hearing all matters of personal defense that landowners might plead, a state court may refuse to accept the former's judgment as determinative of the landowners' liabilities.[15] Similarly, though a confession of judgment upon a note, with a warrant of attorney annexed, in favor of the holder, is in conformity with a state law and usage as declared by the highest court of the state in which the judgment is rendered, the judgement may be collaterally impeached upon the ground that the party in whose behalf it was rendered was not in fact the holder.[16] But a consent decree, which under the law of the state has the same force and effect as a decree *in invitum*, must be given the same effect in the courts of another state.[17]

Subsequent to its departure from *Hampton v. McConnell*,[18] the Court does not appear to have formulated, as a substitute, any clear-cut principles for disposing of the contention that a state need not provide a forum for a particular type of judgment of a sister state. Thus, in one case, it held that a New York statute forbidding foreign corporations doing a domestic business to sue on causes originating outside the state was constitutionally applicable to prevent such a corporation from suing on a judgment obtained in a sister state.[19] But, in a later case, it ruled that a Mississippi statute forbidding contracts in cotton futures could not validly close the courts of the state to an action on a judgment obtained in a sister state on such a contract, although the contract in question had been entered into in the forum state and between its citizens.[20] Following the later rather than the earlier precedent, subsequent cases[21] have held: (1) that a state may adopt such system of courts and form of remedy as it sees fit but cannot, under the guise of merely affect-

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[14] Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521 (1873); Robertson v. Pickrell, 109 U.S. 608, 610 (1883).

[15] Kersh Lake Dist. v. Johnson, 309 U.S. 485 (1940). *See also* Texas & Pac. Ry. v. Southern Pacific Co., 137 U.S. 48 (1890).

[16] National Exchange Bank v. Wiley, 195 U.S. 257, 265 (1904). *See also* Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287 (1890).

[17] Harding v. Harding, 198 U.S. 317 (1905).

[18] 16 U.S. (3 Wheat.) 234 (1818).

[19] Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903).

[20] Fauntleroy v. Lum, 210 U.S. 230 (1908). Justice Holmes, who spoke for the Court in both cases, asserted in his opinion in the latter that the New York statute was "directed to jurisdiction," the Mississippi statute to "merits," but four Justices could not grasp the distinction.

[21] Kenney v. Supreme Lodge, 252 U.S. 411 (1920), and cases there cited. Holmes again spoke for the Court. *See also* Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 434 (1919).

ing the remedy, deny enforcement of claims otherwise within the protection of the full faith and credit clause when its courts have general jurisdiction of the subject matter and the parties;[22] (2) that, accordingly, a forum state that has a shorter period of limitations than the state in which a judgment was granted and later revived erred in concluding that, whatever the effect of the revivor under the law of the state of origin, it could refuse enforcement of the revived judgment;[23] (3) that the courts of one state have no jurisdiction to enjoin the enforcement of judgments at law obtained in another state, when the same reasons assigned for granting the restraining order were passed upon on a motion for new trial in the action at law and the motion denied;[24] (4) that the constitutional mandate requires credit to be given to a money judgment rendered in a civil cause of action in another state, even though the forum state would have been under no duty to entertain the suit on which the judgment was founded, because a state cannot, by the adoption of a particular rule of liability or of procedure, exclude from its courts a suit on a judgment;[25] and (5) that, similarly, tort claimants in State A who obtain a judgment against a foreign insurance company, notwithstanding that, prior to judgment, domiciliary State B appointed a liquidator for the company, vested company assets in him, and ordered suits against the company stayed, are entitled to have such judgment recognized in State B for purposes of determining the amount of the claim, although not for determination of what priority, if any, their claim should have.[26]

Jurisdiction: A Prerequisite to Enforcement of Judgments

The jurisdictional question arises both in connection with judgments *in personam* against nonresident defendants to whom it is alleged personal service was not obtained in the state originating the judgment and in relation to judgments *in rem* against property or a status alleged not to have been within the jurisdiction of the

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[22] Broderick v. Rosner, 294 U.S. 629 (1935), approved in Hughes v. Fetter, 341 U.S. 609 (1951).

[23] Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949); *see also* Roche v. McDonald, 275 U.S. 449 (1928).

[24] Embry v. Palmer, 107 U.S. 3, 13 (1883).

[25] Titus v. Wallick, 306 U.S. 282, 291–292 (1939).

[26] Morris v. Jones, 329 U.S. 545 (1947). Moreover, there is no apparent reason why Congress, acting on the implications of Marshall's words in Hampton v. McConnell, 16 U.S. (3 Wheat.) 234 (1818), should not clothe extrastate judgments of any particular type with the full status of domestic judgments of the same type in the several states. Thus, why should not a judgment for alimony be made directly enforceable in sister states instead of merely furnishing the basis of an action in debt?

court which handed down the original decree.[27] Records and proceedings of courts wanting jurisdiction are not entitled to credit.[28]

Judgments in Personam.—When the subject matter of a suit is merely the defendant's liability, it is necessary that it should appear from the record that the defendant has been brought within the jurisdiction of the court by personal service of process, or by his voluntary appearance, or that he had in some manner authorized the proceeding.[29] Thus, when a state court endeavored to acquire jurisdiction of a nonresident defendant by an attachment of his property within the state and constructive notice to him, its judgment was defective for want of jurisdiction and hence could not afford the basis of an action against the defendant in the court of another state, although it bound him so far as the property attached by virtue of the inherent right of a state to assist its own citizens in obtaining satisfaction of their just claims.[30]

The fact that a nonresident defendant was only temporarily in the state when he was served in the original action does not vitiate the judgment thus obtained and later relied upon as the basis of an action in his home state.[31] Also a judgment rendered in the state of his domicile against a defendant who, pursuant to the statute thereof providing for the service of process on absent defendants, was personally served in another state is entitled to full faith and

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[27] Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870); Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). Full faith and credit extends to the issue of the original court's jurisdiction, when the second court's inquiry discloses that the question of jurisdiction had been fully and fairly litigated and finally decided in the court which rendered the original judgment. Durfee v. Duke, 375 U.S. 106 (1963); Underwriters Assur. Co. v. North Carolina Life Ins. Ass'n, 455 U.S. 691 (1982).

[28] Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521, 528 (1873). *See also* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291 (1888); Huntington v. Attrill, 146 U.S. 657, 685 (1892); Brown v. Fletcher's Estate, 210 U.S. 82 (1908); Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912); Spokane Inland R.R. v. Whitley, 237 U.S. 487 (1915). However, a denial of credit, founded upon a mere suggestion of want of jurisdiction and unsupported by evidence, violates the clause. *See* V.L. v. E.L., 577 U.S. ___, No. 15–648, slip op. at 6 (2016) (per curiam) (holding that where a Georgia judgment appeared on its face to have been issued by a court with jurisdiction and there was no established Georgia law to the contrary, the Alabama Supreme Court erred in refusing to grant the Georgia judgment full faith and credit); *see also* Rogers v. Alabama, 192 U.S. 226, 231 (1904); Wells Fargo & Co. v. Ford, 238 U.S. 503 (1915).

[29] Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287 (1890). *See also* Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874); Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907); Brown v. Fletcher's Estate, 210 U.S. 82 (1908).

[30] Pennoyer v. Neff, 95 U.S. 714 (1878). *See*, for a reformulation of this case's due process foundation, Shaffer v. Heitner, 433 U.S. 186 (1977).

[31] Renaud v. Abbot, 116 U.S. 277 (1886); Jaster v. Currie, 198 U.S. 144 (1905); Reynolds v. Stockton, 140 U.S. 254 (1891).

credit.[32] When the matter of fact or law on which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment.[33]

Because the principle of *res judicata* applies only to proceedings between the same parties and privies, the plea by defendant in an action based on a judgment that he was not party or privy to the original action raises the question of jurisdiction; although a judgment against a corporation in one state may validly bind a stockholder in another state to the extent of the par value of his holdings,[34] an administrator acting under a grant of administration in one state stands in no sort of relation of privity to an administrator of the same estate in another state.[35] But where a judgment of dismissal was entered in a federal court in an action against one of two joint tortfeasors, in a state in which such a judgment would constitute an estoppel in another action in the same state against the other tortfeasor, such judgment is not entitled to full faith and credit in an action brought against the tortfeasor in another state.[36]

Service on Foreign Corporations.—In 1856, the Court decided *Lafayette Ins. Co. v. French*,[37] a pioneer case in its general class. It held that, where a corporation chartered by the State of Indiana was allowed by a law of Ohio to transact business in the latter state upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment obtained against the corporation by means of such process ought to receive in Indiana the same faith and credit

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[32] Milliken v. Meyer, 311 U.S. 457, 463 (1940). In the pioneer case of D'Arcy v. Ketchum, 52 U.S. (1 How.) 165 (1851), the question presented was whether a judgment rendered by a New York court, under a statute which provided that, when joint debtors were sued and one of them was brought into court on a process, a judgment in favor of the plaintiff would entitle him to execute against all, must be accorded full faith and credit in Louisiana when offered as a basis of an action in debt against a resident of that state who had not been served by process in the New York action. The Court ruled that the original implementing statute, 1 Stat. 122 (1790), did not reach this type of case, and hence the New York judgment was not enforceable in Louisiana against defendant. Had the Louisiana defendant thereafter ventured to New York, however, he could, as the Constitution then stood, have been subjected to the judgment to the same extent as the New York defendant who had been personally served. Subsequently, the disparity between operation of personal judgment in the home state has been eliminated, because of the adoption of the Fourteenth Amendment. In divorce cases, however, it still persists in some measure. *See infra*.

[33] Adam v. Saenger, 303 U.S. 59, 62 (1938).

[34] Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900).

[35] Stacy v. Thrasher, 47 U.S. (6 How.) 44, 58 (1848).

[36] Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912).

[37] 59 U.S. (18 How.) 404 (1856).

as it was entitled to in Ohio.[38] Later cases establish under both the Fourteenth Amendment and Article IV, § 1, that the cause of action must have arisen within the state obtaining service in this way,[39] that service on an officer of a corporation, not its resident agent and not present in the state in an official capacity, will not confer jurisdiction over the corporation,[40] that the question whether the corporation was actually "doing business" in the state may be raised.[41] On the other hand, the fact that the business was interstate is no objection.[42]

Service on Nonresident Motor Vehicle Owners.—By analogy to the above cases, it has been held that a state may require nonresident owners of motor vehicles to designate an official within the state as an agent upon whom process may be served in any legal proceedings growing out of their operation of a motor vehicle within the state.[43] Although these cases arose under the Fourteenth Amendment alone, unquestionably a judgment validly obtained upon this species of service could be enforced upon the owner of a car through the courts of his home state.

Judgments in Rem.—In sustaining the challenge to jurisdiction in cases involving judgments *in personam*, the Court in the main was making only a somewhat more extended application of recognized principles. In order to sustain the same kind of challenge in cases involving judgments *in rem* it has had to make law outright. The leading case is *Thompson v. Whitman*.[44] Thompson, sheriff of Monmouth County, New Jersey, acting under a New Jersey statute, had seized a sloop belonging to Whitman and by a proceeding *in rem* had obtained its condemnation and forfeiture in a local court. Later, Whitman, a citizen of New York, brought an action for trespass against Thompson in the United States Circuit Court for the Southern District of New York, and Thompson answered by producing a record of the proceedings before the New Jersey tribunal. Whitman thereupon set up the contention that the New Jersey court had acted without jurisdiction, inasmuch as the sloop which was the subject matter of the proceedings had been seized outside the

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[38] To the same effect is Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[39] Simon v. Southern Ry., 236 U.S. 115 (1915).

[40] Goldey v. Morning News, 156 U.S. 518 (1895); Riverside Mills v. Menefee, 237 U.S. 189 (1915).

[41] International Harvester v. Kentucky, 234 U.S. 579 (1914); Riverside Mills v. Menefee, 237 U.S. 189 (1915).

[42] International Harvester v. Kentucky, 234 U.S. 579 (1914).

[43] Kane v. New Jersey, 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927), limited in Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[44] 85 U.S. (18 Wall.) 457 (1874).

county to which, by the statute under which it had acted, its jurisdiction was confined.

As previously explained, the plea of lack of privity cannot be set up in defense in a sister state against a judgment *in rem*. In a proceeding *in rem*, however, the presence of the *res* within the court's jurisdiction is a prerequisite, and this, it was urged, had not been the case in *Thompson v. Whitman*. Could, then, the Court consider this challenge with respect to a judgment which was offered, not as the basis for an action for enforcement through the courts of a sister state but merely as a defense in a collateral action? As the law stood in 1873, it apparently could not.[45] All difficulties, nevertheless, to its consideration of the challenge to jurisdiction in the case were brushed aside by the Court. Whenever, it said, the record of a judgment rendered in a state court is offered "in evidence" by either of the parties to an action in another state, it may be contradicted as to the facts necessary to sustain the former court's jurisdiction; "and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding the claim that they did exist."[46]

Divorce Decrees: Domicile as the Jurisdictional Prerequisite

This, however, was only the beginning of the Court's lawmaking in cases *in rem*. The most important class of such cases is that in which the respondent to a suit for divorce offers in defense an earlier decree from the courts of a sister state. By the almost universally accepted view prior to 1906, a proceeding in divorce was one against the marriage status, *i.e.*, *in rem*, and hence might be validly brought by either party in any state where he or she was *bona fide* domiciled;[47] and, conversely, when the plaintiff did not have a *bona fide* domicile in the state, a court could not render a decree binding in other states even if the nonresident defendant entered a personal appearance.[48]

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[45] 1 H. Black, A Treatise on the Law of Judgments § 246 (1891).

[46] *See also* Simmons v. Saul, 138 U.S. 439, 448 (1891). In other words, the challenge to jurisdiction is treated as equivalent to the plea nul tiel record, a plea that was recognized even in Mills v. Duryee as available against an attempted invocation of the full faith and credit clause. What is not pointed out by the Court is that it was also assumed in the earlier case that such a plea could always be rebutted by producing a transcript, properly authenticated in accordance with the act of Congress, of the judgment in the original case. *See also* Brown v. Fletcher's Estate, 210 U.S. 82 (1908); German Savings Soc'y v. Dormitzer, 192 U.S. 125, 128 (1904); Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287, 294 (1890).

[47] Cheever v. Wilson, 76 U.S. (9 Wall.) 108 (1870).

[48] Andrews v. Andrews, 188 U.S. 14 (1903). *See also* German Savings Soc'y v. Dormitzer, 192 U.S. 125 (1904).

Sec. 1—Full Faith and Credit

Divorce Suit: In Rem or in Personam; Judicial Indecision.—In 1906, however, by a vote of five to four, the Court departed from its earlier ruling, rendered five years previously in *Atherton v. Atherton*,[49] and in *Haddock v. Haddock*,[50] it announced that a divorce proceeding might be viewed as one *in personam*. In the former case it was held, in the latter case denied, that a divorce granted a husband without personal service upon the wife, who at the time was residing in another state, was entitled to recognition under the full faith and credit clause and the acts of Congress; the difference between the cases consisted solely in the fact that in the *Atherton* case the husband had driven the wife from their joint home by his conduct, while in the *Haddock* case he had deserted her. The court that granted the divorce in *Atherton v. Atherton* was held to have had jurisdiction of the marriage status, with the result that the proceeding was one *in rem* and hence required only service by publication upon the respondent. Haddock's suit, on the contrary, was held to be as to the wife *in personam* and so to require personal service upon her or her voluntary appearance, neither of which had been had; although, notwithstanding this, the decree in the latter case was held to be valid in the state where obtained because of the state's inherent power to determine the status of its own citizens. The upshot was a situation in which a man and a woman, when both were in Connecticut, were divorced; when both were in New York, were married; and when the one was in Connecticut and the other in New York, the former was divorced and the latter married. In *Atherton v. Atherton* the Court had earlier acknowledged that "a husband without a wife, or a wife without a husband, is unknown to the law."

The practical difficulties and distresses likely to result from such anomalies were pointed out by critics of the decision at the time. In point of fact, they have been largely avoided, because most of the state courts have continued to give judicial recognition and full faith and credit to one another's divorce proceedings on the basis of the older idea that a divorce proceeding is one *in rem*, and that if the applicant is *bona fide* domiciled in the state the court has jurisdiction in this respect. Moreover, until the second of the *Williams v. North Carolina* cases[51] was decided in 1945, there had not been manifested the slightest disposition to challenge judicially the power of the states to determine what shall constitute domicile for divorce purposes. A few years before, the Court in *Davis v. Davis*[52]

[49] 181 U.S. 155, 162 (1901).
[50] 201 U.S. 562 (1906).
[51] 317 U.S. 287 (1942) 325 U.S. 226 (1945).
[52] 305 U.S. 32 (1938).

rejected contentions adverse to the validity of a Virginia decree of which enforcement was sought in the District of Columbia. In this case, a husband, after having obtained in the District a decree of separation subject to payment of alimony, established years later a residence in Virginia and sued there for a divorce. Personally served in the District, where she continued to reside, the wife filed a plea denying that her husband was a resident of Virginia and averred that he was guilty of a fraud on the court in seeking to establish a residence for purposes of jurisdiction. In ruling that the Virginia decree, granting to the husband an absolute divorce minus any alimony payment, was enforceable in the District, the Court stated that in view of the wife's failure, while in Virginia litigating her husband's status to sue, to answer the husband's charges of willful desertion, it would be unreasonable to hold that the husband's domicile in Virginia was not sufficient to entitle him to a divorce effective in the District. The finding of the Virginia court on domicile and jurisdiction was declared to bind the wife. *Davis v. Davis* is distinguishable from the *Williams v. North Carolina* decisions in that in the former determination of the jurisdictional prerequisite of domicile was made in a contested proceeding whereas in the *Williams* cases it was not.

Williams I and Williams II.—In *Williams* I and *Williams* II, the husband of one marriage and the wife of another left North Carolina, obtained six-week divorce decrees in Nevada, married there, and resumed their residence in North Carolina where both previously had been married and domiciled. Prosecuted for bigamy, the defendants relied upon their Nevada decrees and won the preliminary round of this litigation, that is, in *Williams* I,[53] when a majority of the Justices, overruling *Haddock v. Haddock*, declaring that in this case, the Court must assume that the petitioners for divorce had a *bona fide* domicile in Nevada and not that their Nevada domicile was a sham. "[E]ach State, by virtue of its command over the domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of substituted service meet the requirements of due process." Accordingly, a decree granted by Nevada to one, who, it is assumed, is at the time *bona fide* domiciled therein, is binding upon the courts of other states, including North Carolina in which the marriage was performed and where the other party to the marriage is still domiciled when the divorce was decreed. In view of its assumptions, which it justified

[53] 317 U.S. 287, 298–99 (1942).

on the basis of an inadequate record, the Court did not here pass upon the question whether North Carolina had the power to refuse full faith and credit to a Nevada decree because it was based on residence rather than domicile or because, contrary to the findings of the Nevada court, North Carolina found that no *bona fide* domicile had been acquired in Nevada.[54]

Presaging what ruling the Court would make when it did get around to passing upon the latter question, Justice Jackson, dissenting in *Williams* I, protested that "this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there. . . . While a state can no doubt set up its own standards of domicile as to its internal concerns, I do not think it can require us to accept and in the name of the Constitution impose them on other states. . . . The effect of the Court's decision today—that we must give extraterritorial effect to any judgment that a state honors for its own purposes—is to deprive this Court of control over the operation of the full faith and credit and the due process clauses of the Federal Constitution in cases of contested jurisdiction and to vest it in the first state to pass on the facts necessary to jurisdiction." [55]

Notwithstanding that one of the deserted spouses had died since the initial trial and that another had remarried, North Carolina, without calling into question the status of the latter marriage, began a new prosecution for bigamy; when the defendants appealed the conviction resulting therefrom, the Supreme Court, in *Williams* II,[56] sustained the adjudication of guilt as not denying full faith and credit to the Nevada divorce decree. Reiterating the doctrine that jurisdiction to grant divorce is founded on domicile,[57] the Court held that a decree of divorce rendered in one state may be collaterally impeached in another by proof that the court that rendered the decree lacked jurisdiction (the parties not having been domiciled therein), even though the record of proceedings in that court purports to show jurisdiction.[58]

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[54] 317 U.S. at 302.

[55] 317 U.S. at 312, 321, 315.

[56] 325 U.S. 226, 229 (1945).

[57] Bell v. Bell, 181 U.S. 175 (1901); Andrews v. Andrews, 188 U.S. 14 (1903).

[58] Strong dissents were filed, which have influenced subsequent holdings. Among these was that of Justice Rutledge, which attacked both the consequences of the decision as well as the concept of jurisdictional domicile on which it was founded:

"Unless 'matrimonial domicil,' banished in *Williams I* [by the overruling of *Haddock v. Haddock*], has returned renamed ['domicil of origin'] in *Williams II*, every decree becomes vulnerable in every state. Every divorce, wherever granted . . . may now be reexamined by every other state, upon the same or different evidence, to redetermine the 'jurisdiction fact,' always the ultimate conclusion of 'domicil.' . . . " 325 U.S. at 248.

Sec. 1—Full Faith and Credit

Cases Following Williams II.—Fears registered by the dissenters in the second *Williams* case that it might undermine the stability of all divorces and that the court of each forum state, by its own independent determination of domicile, might refuse recognition of foreign decrees, were temporarily set at rest by *Sherrer v. Sherrer*,[59] which required Massachusetts, a state of domiciliary origin, to accord full faith and credit to a 90-day Florida decree that the husband had contested. The husband, upon receiving notice by mail, retained Florida counsel who entered a general appearance and denied all allegations in the complaint, including the wife's residence. At the hearing, the husband, though present in person and by counsel, did not offer evidence in rebuttal of the wife's proof of her Florida residence, and, when the Florida court ruled that she was a *bona fide* resident, the husband did not appeal. Because the findings of the requisite jurisdictional facts, unlike those in the second *Williams* case, were made in proceedings in which the defendant appeared and participated, the requirements of full faith and credit were held to bar him from collaterally attacking such findings in a suit instituted by him in his home state of Massachu-

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"The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common law conception. . . . No legal conception, save possibly 'jurisdiction' . . . affords such possibilities for uncertain application. . . . Apart from the necessity for travel, [to effect a change of domicile, the latter] criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity. . . . When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. . . . [The majority has] not held that denial of credit will be allowed, only if the evidence [as to the place of domicile] is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact 'not unreasonably.' . . . But [the Court] does not define 'not unreasonably.' It vaguely suggests a supervisory function, to be exercised when the denial [of credit] strikes its sensibilities as wrong, by some not stated standard. . . . There will be no 'weighing' [of evidence]. There will be only examination for sufficiency, with the limits marked by 'scintillas' and the like." 325 U.S. at 255, 258, 259, 251.

No less disposed to prophesy undesirable results from this decision was Justice Black whose dissenting opinion Justice Douglas joined:

"[T]oday, as to divorce decrees, [the Full Faith and Credit Clause] . . . has become a nationally disruptive force. . . . [T]he Court has in effect [held] . . . that 'the full faith and credit clause does not apply to actions for divorce, and that the states alone have the right to determine what effect shall be given to the decrees of other states in this class of cases.' . . . If the Court is today abandoning that principle . . . that a marriage validly consummated under one state's laws is valid in every other state [, then a] . . . consequence is to subject people to criminal prosecutions for adultery and bigamy merely because they exercise their constitutional right to pass from a state in which they were validly married on to another state which refuses to recognize their marriage. Such a consequence runs counter to the basic guarantees of our federal union." 325 U.S. at 264, 265.

[59] 334 U.S. 343 (1948).

setts, particularly in the absence of proof that the divorce decree was subject to such collateral attack in a Florida court. Having failed to take advantage of the opportunities afforded him by his appearance in the Florida proceeding, the husband was thereafter precluded from relitigating in another state the issue of his wife's domicile already passed upon by the Florida court.

In *Coe v. Coe*,[60] embracing a similar set of facts, the Court applied like reasoning to reach a similar result. Massachusetts again was compelled to recognize the validity of a six-week Nevada decree obtained by a husband who had left Massachusetts after a court of that state had refused him a divorce and had granted his wife separate support. In the Nevada proceeding, the wife appeared personally and by counsel filed a cross-complaint for divorce, admitted the husband's residence, and participated personally in the proceedings. After finding that it had jurisdiction of the plaintiff, defendant, and the subject matter involved, the Nevada court granted the wife a divorce, which was valid, final, and not subject to collateral attack under Nevada law. The husband married again, and on his return to Massachusetts, his ex-wife petitioned the Massachusetts court to adjudge him in contempt for failing to make payments for her separate support under the earlier Massachusetts decree. Inasmuch as there was no intimation that under Massachusetts law a decree of separate support would survive a divorce, recognition of the Nevada decree as valid accordingly necessitated a rejection of the ex-wife's contention.

Appearing to review *Williams* II, and significant for the social consequences produced by the result it decreed, is *Rice v. Rice*.[61] To

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[60] 334 U.S. 378 (1948). In a dissenting opinion filed in Sherrer v. Sherrer, but applicable also to Coe v. Coe, Justice Frankfurter, with Justice Murphy concurring, asserted his inability to accept the proposition advanced by the majority that "regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering bargain-counter divorces was a sham, the home State of the parties is not permitted to question the matter if the form of a controversy has been gone through." 334 U.S. at 377.

[61] 336 U.S. 674 (1949). Of four justices dissenting, Black, Douglas, Rutledge, and Jackson, Justice Jackson alone filed a written opinion. To him the decision was "an example of the manner in which, in the law of domestic relations, 'confusion now hath made his masterpiece,' . . . I think that the judgment of the Connecticut court, but for the first *Williams* case and its progeny, might properly have held that the Rice divorce decree was void for every purpose because it was rendered by a state court which never obtained jurisdiction of the nonresident defendant and which had no power to reach into another state and summon her before it. But if we adhere to the holdings that the Nevada court had power over her for the purpose of blasting her marriage and opening the way to a successor, I do not see the justice of inventing a compensating confusion in the device of divisible divorce by which the parties are half-bound and half-free and which permits Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife." Id. at 676, 679–680.

determine the widowhood status of the party litigants in relation to inheritance of property of a husband who had deserted his first wife in Connecticut, had obtained an *ex parte* divorce in Nevada, and after remarriage, had died without ever returning to Connecticut, the first wife, joining the second wife and the administrator of his estate as defendants, petitioned a Connecticut court for a declaratory judgment. After having placed upon the first wife the burden of proving that the decedent had not acquired a *bona fide* domicile in Nevada, and after giving proper weight to the claims of power by the Nevada court, the Connecticut court concluded that the evidence sustained the contentions of the first wife, and in so doing, it was upheld by the Supreme Court. *Sherrer v. Sherrer* and *Coe v. Coe*, previously discussed, were declared not to be in point, because no personal service had been made upon the first wife, nor had she in any way participated in the Nevada proceedings. She was not, therefore, precluded from challenging the findings of the Nevada court that the decedent was, at the time of the divorce, domiciled in that state.[62]

Claims for Alimony or Property in Forum State.—In *Esenwein v. Commonwealth*,[63] decided on the same day as the second *Williams* case, the Supreme Court also sustained a Pennsylvania court in its refusal to recognize an *ex parte* Nevada decree on the ground that the husband who obtained it never acquired a *bona fide* domicile in the latter state. In this instance, the husband and wife had separated in Pennsylvania, where the wife was granted a support order; after two unsuccessful attempts to win a divorce in that state, the husband departed for Nevada. Upon the receipt of a Nevada decree, the husband thereafter established a residence in Ohio and filed an action in Pennsylvania for total relief from the support order. In a concurring opinion, in which he was joined by Justice Black, Justice Douglas stressed the "basic difference between the problem of marital capacity and the problem of support," and stated that it was "not apparent that the spouse who obtained the decree can de-

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[62] Vermont violated the clause in sustaining a collateral attack on a Florida divorce decree, the presumption of Florida's jurisdiction over the cause and the parties not having been overcome by extrinsic evidence or the record of the case. Cook v. Cook, 342 U.S. 126 (1951). *Sherrer* and *Coe* were relied upon. There seems, therefore, to be no doubt of their continued vitality.

A Florida divorce decree was also at the bottom of another case in which the daughter of a divorced man by his first wife and his legatee under his will sought to attack his divorce in the New York courts and thereby indirectly his third marriage. The Court held that, because the attack would not have been permitted in Florida under the doctrine of *res judicata*, it was not permissible under the Full Faith and Credit Clause in New York. On the whole, it appears that the principle of *res judicata* is slowly winning out against the principle of domicile. Johnson v. Muelberger, 340 U.S. 581 (1951).

[63] 325 U.S. 279 (1945).

feat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree," unless the other spouse appeared or was personally served. "The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized." Or, as Justice Rutledge succinctly stated in a concurring opinion, "the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter the marital status with extraterritorial effect."[64]

Three years later, but on this occasion speaking for a majority of the Court, Justice Douglas reiterated these views in *Estin v. Estin*.[65] In this case, a New York court had granted a wife a decree of separation and awarded her alimony. Subsequently, in Nevada, her husband obtained an *ex parte* divorce decree, which made no provision for alimony. He ceased paying the New York-awarded alimony, and the wife sued him in New York. The husband argued that the Nevada decree had wiped out the alimony claim, but Justice Douglas found that "Nevada had no power to adjudicate [the wife's] rights in the New York judgment, [and] New York need not give full faith and credit to that phase of Nevada's judgment. . . . . The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony."[66] Accordingly, the Nevada decree could not prevent New York from applying its own rule of law which, unlike that of Pennsylvania,[67] does permit a support order to survive a divorce decree.[68]

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[64] 325 U.S. at 281–83.

[65] 334 U.S. 541 (1948). *See also* the companion case of Kreiger v. Kreiger, 334 U.S. 555 (1948).

[66] 334 U.S. at 549.

[67] Esenwein v. Commonwealth, 325 U.S. 279, 280 (1945).

[68] Because the record, in his opinion, did not make it clear whether New York "law" held that no "*ex parte*" divorce decree could terminate a prior New York separate maintenance decree, or merely that no "*ex parte*" decree of divorce *of another State* could, Justice Frankfurter dissented and recommended that the case be remanded for clarification. Justice Jackson dissented on the ground that under New York law, a New York divorce would terminate the wife's right to alimony, and if the Nevada decree is good, it was entitled to no less effect in New York than a local decree. However, for reasons stated in his dissent in the first *Williams* case, 317 U.S. 287, he would have preferred not to give standing to constructive service divorces obtained on short residence. 334 U.S. 541, 549–54 (1948). These two Justices filed similar dissents in the companion case of Kreiger v. Kreiger, 334 U.S. 555, 557 (1948).

Sec. 1—Full Faith and Credit

Such a result was justified as "accommodat[ing] the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern,"[69] the concern of New York being that of protecting the abandoned wife against impoverishment. In *Simons v. Miami National Bank*,[70] the Court held that a dower right in the deceased husband's estate is extinguished even though a divorce decree was obtained in a proceeding in which the nonresident wife was served by publication only and did not make a personal appearance.[71] The Court found the principle of *Estin v. Estin* [72] inapplicable. In *Simons*, the Court rejected the contention that the forum court, in giving recognition to the foreign court's separation decree providing for maintenance and support, has to allow for dower rights in the deceased husband's estate in the forum state.[73] Full faith and credit is not denied to a sister state's separation decree, including an award of monthly alimony, where nothing in the foreign state's separation decree could be construed as creating or preserving any interest in the nature of or in lieu of dower in any property of the decedent, wherever located and where the law of the forum state did not treat such a decree as having such effect nor indicate such an effect irrespective of the existence of the foreign state's decree.[74]

Decrees Awarding Alimony, Custody of Children.—A by-product of divorce litigation are decrees for the payment of alimony, judgments for accrued and unpaid installments of alimony, and judicial awards of the custody of children, all of which necessitate application of the Full Faith and Credit Clause when extrastate enforcement is sought for them. Thus, a judgment in State A for alimony in arrears and payable under a prior judgment of separation that is not by its terms conditional nor subject by the law of State A to modification or recall, and on which execution was directed to issue, is entitled to recognition in the forum state. Although an obligation for accrued alimony could have been modified or set aside in State A prior to its merger in the judgment, such a judgment, by the law of State A, is not lacking in finality.[75] As to the finality of alimony decrees in general, the Court had previously ruled that where such a decree is rendered, payable in future installments, the right to such installments becomes absolute and vested on becoming due, provided no modification of the decree has been

[69] 334 U.S. at 549.
[70] 381 U.S. 81 (1965).
[71] 381 U.S. at 84–85.
[72] 334 U.S. 541 (1948).
[73] 381 U.S. at 84–85.
[74] 381 U.S. at 85.
[75] Barber v. Barber, 323 U.S. 77, 84 (1944).

made prior to the maturity of the installments.[76] However, a judicial order requiring the payment of arrearages in alimony, which exceeded the alimony previously decreed, is invalid for want of due process, the respondent having been given no opportunity to contest it.[77] "A judgment obtained in violation of procedural due process," said Chief Justice Stone, "is not entitled to full faith and credit when sued upon in another jurisdiction." [78]

An example of a custody case was one involving a Florida divorce decree that was granted *ex parte* to a wife who had left her husband in New York, where he was served by publication. The decree carried with it an award of the exclusive custody of the child, whom the day before the husband had secretly seized and brought back to New York. The Court ruled that the decree was adequately honored by a New York court when, in *habeas corpus* proceedings, it gave the father rights of visitation and custody of the child during stated periods and exacted a surety bond of the wife conditioned on her delivery of the child to the father at the proper times,[79] it having not been "shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida laws. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida."

Answering a question left open in the preceding holding as to the binding effect of the *ex parte* award, the Court more recently acknowledged that, in a proceeding challenging a mother's right to retain custody of her children, a state is not required to give effect to the decree of another state's court, which had never acquired personal jurisdiction over the mother of her children, and which awarded custody to the father as the result of an *ex parte* divorce action in-

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[76] Sistare v. Sistare, 218 U.S. 1, 11 (1910). *See also* Barber v. Barber, 62 U.S. (21 How.) 582 (1859); Lynde v. Lynde, 181 U.S. 183, 186–187 (1901); Audubon v. Shufeldt, 181 U.S. 575, 577 (1901); Bates v. Bodie, 245 U.S. 520 (1918); Yarborough v. Yarborough, 290 U.S. 202 (1933); Loughran v. Loughran, 292 U.S. 216 (1934).

[77] Griffin v. Griffin, 327 U.S. 220 (1946).

[78] 327 U.S. at 228. An alimony case of a quite extraordinary pattern was that of Sutton v. Leib, 342 U.S. 402 (1952). Because of the diverse citizenship of the parties, who had once been husband and wife, the case was brought by the latter in a federal court in Illinois. Her suit was to recover unpaid alimony that was to continue until her remarriage. To be sure, she had, as she confessed, remarried in Nevada, but the marriage had been annulled in New York on the ground that the man was already married, because his divorce from his previous wife was null and void, she having neither entered a personal appearance nor been personally served. The Court, speaking by Justice Reed, held that the New York annulment of the Nevada marriage must be given full faith and credit in Illinois but left Illinois to decide for itself the effect of the annulment upon the obligations of petitioner's first husband.

[79] Halvey v. Halvey, 330 U.S. 610, 615 (1947).

stituted by him.[80] In *Kovacs v. Brewer*,[81] however, the Court indicated that a finding of changed circumstances rendering observance of an absentee foreign custody decree inimical to the best interests of the child is essential to sustain the validity of the forum court's refusal to enforce a foreign decree, rendered with jurisdiction over all the parties but the child, and revising an initial decree by transferring custody from the paternal grandfather to the mother. However, when, as is true in Virginia, agreements by parents as to shared custody of a child do not bind the state's courts, the dismissal by a Virginia court of a *habeas corpus* petition instituted by a father to obtain custody was not *res judicata* in that state; therefore, even if the Full Faith and Credit Clause were applicable to child custody decrees, it would not require a South Carolina court, in a custody suit instituted by the wife, to recognize a court order not binding in Virginia.[82]

Status of the Law.—The doctrine of divisible divorce, as developed by Justice Douglas in *Estin v. Estin*,[83] may have become the prevailing standard for determining the enforceability of foreign divorce decrees. If this is the case, then it may be that an *ex parte* divorce, founded upon acquisition of domicile by one spouse in the state that granted it, is effective to destroy the marital status of both parties in the state of domiciliary origin and probably in all other states. The effect is to preclude subsequent prosecutions for bigamy but not to alter rights as to property, alimony, or custody of children in the state of domiciliary origin of a spouse who neither was served nor appeared personally.

In any event, the accuracy of these conclusions has not been impaired by any decision of the Court since 1948. Thus, in *Armstrong v. Armstrong*,[84] an *ex parte* divorce decree obtained by the husband in Florida was deemed to have been adequately recognized by an Ohio court when, with both parties before it, it disposed of the wife's suit for divorce and alimony with a decree limited solely to an award

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[80] May v. Anderson, 345 U.S. 528 (1953). Justices Jackson, Reed, and Minton dissented.

[81] 356 U.S. 604 (1958). Rejecting the implication that recognition must be accorded unless the circumstances have changed, Justice Frankfurter dissented on the ground that in determining what is best for the welfare of the child, the forum court cannot be bound by an absentee, foreign custody decree, "irrespective of whether changes in circumstances are objectively provable."

[82] Ford v. Ford, 371 U.S. 187, 192–94 (1962). As part of a law dealing with parental kidnaping, Congress, in Pub. L. 96–611, 8(a), 94 Stat. 3569, 28 U.S.C. § 1738A, required states to give full faith and credit to state court custody decrees provided the original court had jurisdiction and is the home state of the child.

[83] 334 U.S. 541 (1948).

[84] 350 U.S. 568 (1956).

of alimony.[85] Similarly, a New York court was held not bound by an *ex parte* Nevada divorce decree, rendered without personal jurisdiction over the wife, to the extent that it relieved the husband of all marital obligations, and in an *ex parte* action for separation and alimony instituted by the wife, it was competent to sequester the husband's property in New York to satisfy his obligations to the wife.[86]

Other Types of Decrees

Probate Decrees.—Many judgments, enforcement of which has given rise to litigation, embrace decrees of courts of probate respecting the distribution of estates. In order that a court have jurisdiction of such a proceeding, the decedent must have been domiciled in the state, and the question whether he was so domiciled at the time of his death may be raised in the court of a sister state.[87] Thus, when a court of State A, in probating a will and issuing letters, in a proceeding to which all distributees were parties, expressly found that the testator's domicile at the time of death was in State A, such adjudication of domicile was held not to bind one subsequently appointed as domiciliary administrator c.t.a. in State B, in which he was liable to be called upon to deal with claims of local creditors and that of the State itself for taxes, he having not been a party to the proceeding in State A. In this situation, it was held, a court of State C, when disposing of local assets claimed by both personal representatives, was free to determine domicile in accordance with the law of State C.[88]

Similarly, there is no such relation of privity between an executor appointed in one state and an administrator c.t.a. appointed in another state as will make a decree against the latter binding upon the former.[89] On the other hand, judicial proceedings in one state, under which inheritance taxes have been paid and the administration upon the estate has been closed, are denied full faith and credit by the action of a probate court in another state in assuming jurisdiction and assessing inheritance taxes against the beneficiaries of

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[85] Four Justices, Black, Douglas, Clark, and Chief Justice Warren, disputed the Court's contention that the Florida decree contained no ruling on the wife's entitlement to alimony and mentioned that for want of personal jurisdiction over the wife, the Florida court was not competent to dispose of that issue. 350 U.S. at 575.

[86] Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). Two Justices dissented. Justice Frankfurter was unable to perceive "why dissolution of the marital relation is not so personal as to require personal jurisdiction over the absent spouse, while the denial of alimony . . . is." Justice Harlan maintained that, because the wife did not become a domiciliary of New York until after the Nevada decree, she had no pre-divorce rights in New York that the latter was obligated to protect.

[87] Tilt v. Kelsey, 207 U.S. 43 (1907); Burbank v. Ernst, 232 U.S. 162 (1914).

[88] Riley v. New York Trust Co., 315 U.S. 343 (1942).

[89] Brown v. Fletcher's Estate, 210 U.S. 82, 90 (1908). *See also* Stacy v. Thrasher, 47 U.S. (6 How.) 44, 58 (1848); McLean v. Meek, 59 U.S. (18 How.) 16, 18 (1856).

the estate, when under the law of the former state the order of the probate court barring all creditors who had failed to bring in their demand from any further claim against the executors was binding upon all.[90] What is more important, however, is that the *res* in such a proceeding, that is, the estate, in order to entitle the judgment to recognition under Article IV, 1, must have been located in the state or legally attached to the person of the decedent. Such a judgment is accordingly valid, generally speaking, to distribute the intangible property of the decedent, though the evidences thereof were actually located elsewhere.[91] This is not so, on the other hand, as to tangibles and realty. In order that the judgment of a probate court distributing these be entitled to recognition under the Constitution, they must have been located in the state; as to tangibles and realty outside the state, the decree of the probate court is entirely at the mercy of the *lex rei sitae*.[92] So, the probate of a will in one state, while conclusive in that state, does not displace legal provisions necessary to its validity as a will of real property in other states.[93]

Adoption Decrees.—That a statute legitimizing children born out of wedlock does not entitle them by the aid of the Full Faith and Credit Clause to share in the property located in another state is not surprising, in view of the general principle (to which there are exceptions) that statutes do not have extraterritorial operation.[94] For the same reason, adoption proceedings in one state are not denied full faith and credit by the law of the sister state that excludes children adopted by proceedings in other states from the right to inherit land in the sister state.[95]

Garnishment Decrees.—Garnishment proceedings combine some of the elements of both an *in rem* and an *in personam* action. Sup-

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[90] Tilt v. Kelsey, 207 U.S. 43 (1907). In the case of Borer v. Chapman, 119 U.S. 587, 599 (1887), involving a complicated set of facts, it was held that a judgment in a probate proceeding, which was merely ancillary to proceedings in another State and which ordered the residue of the estate to be assigned to the legatee and discharged the executor from further liability, did not prevent a creditor, who was not a resident of the State in which the ancillary judgment was rendered, from setting up his claim in the state probate court which had the primary administration of the estate.

[91] Blodgett v. Silberman, 277 U.S. 1 (1928).

[92] Kerr v. Moon, 22 U.S. (9 Wheat.) 565 (1824); McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825); Clarke v. Clarke, 178 U.S. 186 (1900). The controlling principle of these cases is not confined to proceedings in probate. A court of equity "not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree." Fall v. Eastin, 215 U.S. 1, 11 (1909).

[93] Robertson v. Pickrell, 109 U.S. 608, 611 (1883). *See also* Darby v. Mayer, 23 U.S. (10 Wheat.) 465 (1825); Gasquet v. Fenner, 247 U.S. 16 (1918).

[94] Olmstead v. Olmstead, 216 U.S. 386 (1910).

[95] Hood v. McGehee, 237 U.S. 611 (1915).

pose that A owes B and B owes C, and that the two former live in a different state from C. A, while on a brief visit to C's state, is presented with a writ attaching his debt to B and also a summons to appear in court on a named day. The result of the proceedings thus instituted is that a judgment is entered in C's favor against A to the amount of his indebtedness to B. Subsequently A is sued by B in their home state and offers the judgment, which he has in the meantime paid, in defense. It was argued on behalf of B that A's debt to him had a *situs* in their home state and furthermore that C could not have sued B in this same state without formally acquiring a domicile there. Both propositions were, however, rejected by the Court, which held that the judgment in the garnishment proceedings was entitled to full faith and credit as against B's action.[96]

Penal Judgments: Types Entitled to Recognition

The Full Faith and Credit Clause has been interpreted in the light of the "incontrovertible maxim" that "the courts of no country execute the penal laws of another."[97] In the leading case of *Huntington v. Attrill*,[98] however, the Court so narrowly defined "penal" in this connection as to make it substantially synonymous with "criminal" and on this basis held a judgment which had been recovered under a state statute making the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock liable for all of its debts to be entitled under Article IV, § 1, to recognition and enforcement in the courts of sister states. Nor, in general, is a judgment for taxes to be denied full faith and credit in state and federal courts merely because it is for taxes. In *Nelson v. George*,[99] in which a prisoner was tried in California and North Carolina and convicted and sentenced in both states for various felonies, the Court determined that the Full Faith and Credit Clause did not require California to enforce a penal judgment handed down by North Carolina; California was free to consider what effect if any it would give to the North Carolina detainer.[100] Until the obligation to extradite matured, the Full Faith and Credit Clause did not

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[96] Harris v. Balk, 198 U.S. 215 (1905). *See also* Chicago, R.I. & P. Ry. v. Sturm, 174 U.S. 710 (1899); King v. Cross, 175 U.S. 396, 399 (1899); Louisville & Nashville Railroad v. Deer, 200 U.S. 176 (1906); Baltimore & Ohio R.R. v. Hostetter, 240 U.S. 620 (1916). *Harris* itself has not survived the due process reformulation of Shaffer v. Heitner, 433 U.S. 186 (1977). *See* Rush v. Savchuk, 444 U.S. 320 (1980).

[97] *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825). *See also* Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[98] 146 U.S. 657 (1892). *See also* Dennick v. Railroad Co., 103 U.S. 11 (1881); Moore v. Mitchell, 281 U.S. 18 (1930); Milwaukee County v. White Co., 296 U.S. 268 (1935).

[99] 399 U.S. 224 (1970).

[100] 399 U.S. at 229.

require California to enforce the North Carolina penal judgment in any way.

Fraud as a Defense to Suits on Foreign Judgments

With regard to whether recognition of a state judgment can be refused by the forum state on other than jurisdictional grounds, there are dicta to the effect that judgments for which extraterritorial operation is demanded under Article IV, § 1 and acts of Congress are "impeachable for manifest fraud." But unless the fraud affected the jurisdiction of the court, the vast weight of authority is against the proposition. Also, it is universally agreed that a judgment may not be impeached for alleged error or irregularity,[101] or as contrary to the public policy of the state where recognition is sought for it under the Full Faith and Credit Clause.[102] Previously listed cases indicate, however, that the Court in fact has permitted local policy to determine the merits of a judgment under the pretext of regulating jurisdiction.[103] Thus, in *Cole v. Cunningham*,[104] the Court sustained a Massachusetts court in enjoining, in connection with insolvency proceedings instituted in that state, a Massachusetts creditor from continuing in New York courts an action that had been commenced there before the insolvency suit was brought. This was done on the theory that a party within the jurisdiction of a court may be restrained from doing something in another jurisdiction opposed to principles of equity, it having been shown that the creditor was aware of the debtor's embarrassed condition when the New York action was instituted. The injunction unquestionably denied full faith and credit and commanded the assent of only five Justices.

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

Although the language of section one suggests that the same respect should be accorded to "public acts" that is accorded to "judicial proceedings" ("full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"), and the Court has occasionally relied on this parity of treat-

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[101] Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Maxwell v. Stewart, 88 U.S. (21 Wall.) 71 (1875); Hanley v. Donoghue, 116 U.S. 1 (1885); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888); Simmons v. Saul, 138 U.S. 439 (1891); American Express Co. v. Mullins, 212 U.S. 311 (1909).

[102] Fauntleroy v. Lum, 210 U.S. 230 (1908).

[103] Anglo-American Prov. Co. v. Davis Prov. Co., 191 U.S. 373 (1903).

[104] 133 U.S. 107 (1890).

ment,[105] the Court has usually differentiated "the credit owed to laws (legislative measures and common law) and to judgments." [106] The current understanding is that the Full Faith and Credit Clause is "exacting" with respect to final judgments of courts, but "is less demanding with respect to choice of laws." [107]

The Court has explained that, where a statute or policy of the forum state is set up as a defense to a suit brought under the statute of another state or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit Clause and thus compelling courts of each state to subordinate their own statutes to those of others, but by weighing the governmental interests of each jurisdiction.[108] That is, the Full Faith and Credit Clause, in its design to transform the states from independent sovereigns into a single unified nation, directs that a state, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other states and avoid infringement upon their sovereignty. But because the forum state is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.[109]

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[105] *See* Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (statutes); and Smithsonian Institution v. St. John, 214 U.S. 19 (1909) (state constitutional provision).

[106] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998), quoted in Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003). Justice Nelson, in the *Dred Scott* case, drew an analogy to international law, concluding that states, as well as nations, judge for themselves the rules governing property and persons within their territories. Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857). "One State cannot exempt property from taxation in another," the Court concluded in Bonaparte v. Tax Court, 104 U.S. 592 (1882), holding that no provision of the Constitution, including the Full Faith and Credit Clause, enabled a law exempting from taxation certain debts of the enacting state to prevent another state (the state in which the creditor resided) from taxing the debts. *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589–96 (1839); Kryger v. Wilson, 242 U.S. 171 (1916); and Bond v. Hume, 243 U.S. 15 (1917).

[107] Baker v. General Motors Corp., 522 U.S. at 232.

[108] Alaska Packers Ass'n. v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932). When, in a state court, the validity of an act of the legislature of another state is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the Full Faith and Credit Clause. *See also* Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914), citing Glenn v. Garth, 147 U.S. 360 (1893); Lloyd v. Matthews, 155 U.S. 222, 227 (1894); Banholzer v. New York Life Ins. Co., 178 U.S. 402 (1900); Allen v. Alleghany Co., 196 U.S. 458, 465 (1905); Texas & N.O.R.R. v. Miller, 221 U.S. 408 (1911). *See also* National Mut. B. & L. Ass'n v. Brahan, 193 U.S. 635 (1904); Johnson v. New York Life Ins. Co., 187 U.S. 491, 495 (1903); Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93 (1917).

[109] *E.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v.

Sec. 1—Full Faith and Credit

As such, a state need not "substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting a conflicting and opposed policy," so long as the state does not adopt a "policy of hostility to the" public acts of that other state in so doing.[110] In recent years, the Court has, in protracted litigation by a Nevada citizen in a Nevada court over alleged abusive practices by a California state agency, twice interpreted the "policy of hostility" standard.[111] In 2003, in *Franchise Tax Board of California v. Hyatt*, the Supreme Court held that the Nevada Supreme Court did not exhibit "hostility" in declining to apply a California law affording *complete* immunity to state agencies, because the state high court had, in considering "comity principles with a healthy regard for California's sovereign status," legitimately relied on "the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis."[112] Thirteen years later, after the case had been remanded and the Nevada Supreme Court had crafted a "special rule" for damages in the matter wherein the California state agency could not rely on the Nevada sovereign immunity statute limiting liability to $50,000, the Supreme Court reviewed whether the Nevada court's ruling conflicted with the Full Faith and Credit Clause.[113] In contrast to the 2003 ruling, the 2016 ruling held that the Nevada Supreme Court *had* acted in violation of the Full Faith and Credit Clause. Specifically, the High Court concluded that upholding the Nevada Supreme Court's "special rule"—which was supported by a "conclusory statement" respecting California's lack of oversight of its own agencies and was viewed by the Court as reflecting a "policy of hostility to the public Acts' of a sister State"—would allow for a "system of special and discriminatory rules" that conflicted with the Constitution's "vision of 50 individual and equally dignified States."[114] While the Franchise Tax Board litigation demonstrates that the "policy of hostility" standard still exists as a threshold inquiry into whether a state is providing full faith and credit to the public acts of a sister state, ordinarily a state has significant discretion in applying their own choice of law provisions in matters arising in that state's courts, and the Court will not engage in any

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Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[110] *See Carroll*, 349 U.S. at 412–13.

[111] *See* Franchise Tax Bd. of Cal. v. Hyatt (*Franchise Tax Bd. II*), 578 U.S. ___, No. 14–1175, slip op. (2016); Franchise Tax Bd. of Cal. v. Hyatt (*Franchise Tax Bd. I*), 538 U.S. 488 (2003).

[112] *See Franchise Tax Bd. I*, 538 U.S. at 499.

[113] *See Franchise Tax Bd. II*, slip op. at 3–4.

[114] *See id.* at 7.

broad "balancing-of-interests" approach to determine the appropriate application of a given state law.[115]

Transitory Actions: Death Statutes.—The initial effort in this direction was made in connection with transitory actions based on statute. Earlier, such actions had rested upon the common law, which was fairly uniform throughout the states, so that there was usually little discrepancy between the law under which the plaintiff from another jurisdiction brought his action (*lex loci*) and the law under which the defendant responded (*lex fori*). In the late 1870s, however, the states, abandoning the common law rule on the subject, began passing laws that authorized the representatives of a decedent whose death had resulted from injury to bring an action for damages.[116] The question at once presented itself whether, if such an action was brought in a state other than that in which the injury occurred, it was governed by the statute under which it arose or by the law of the forum state, which might be less favorable to the defendant. Nor was it long before the same question presented itself with respect to transitory action *ex contractu,* where the contract involved had been made under laws peculiar to the state where made, and with those laws in view.

Actions Upon Contract.—In *Chicago & Alton R.R. v. Wiggins Ferry Co.*,[117] the Court indicated that it was the law under which the contract was made, not the law of the forum state, that should govern. Its utterance on the point was, however, not merely *dictum*, but was based on an error, namely, the false supposition that the Constitution gives "acts" the same extraterritorial operation as the Act of 1790 does "judicial records and proceedings." Notwith-

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[115] *Id.* at 7–8 (noting that while the Court, in the instant case, could "safely conclude" that Nevada's special rule violated the Constitution, the Court had "abandoned" any broader balancing test with respect to the Full Faith and Credit Clause and "public acts").

[116] Dennick v. Railroad Co., 103 U.S. 11 (1881), was the first so-called "Death Act" case to reach the Supreme Court. *See also* Stewart v. Baltimore & O.R.R., 168 U.S. 445 (1897). Even today the obligation of a state to furnish a forum for the determination of death claims arising in another state under the laws thereof appears to rest on a rather precarious basis. In Hughes v. Fetter, 341 U.S. 609 (1951), the Court, by a narrow majority, held invalid under the full faith and credit clause a statute of Wisconsin which, as locally interpreted, forbade its courts to entertain suits of this nature; in First Nat'l Bank v. United Air Lines, 342 U.S. 396 (1952), a like result was reached under an Illinois statute. More recently, the Court has acknowledged that the Full Faith and Credit Clause does not compel the forum state, in an action for wrongful death occurring in another jurisdiction, to apply a longer period of limitations set out in the wrongful death statute of the state in which the fatal injury was sustained. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953). Justices Jackson, Black, and Minton, in dissenting, advanced the contrary principle that the clause requires that the law where the tort action arose should follow said action in whatever forum it is pursued.

[117] 119 U.S. 615 (1887).

standing which, this *dictum* is today the basis of "the settled rule" that the defendant in a transitory action is entitled to all the benefits resulting from whatever material restrictions the statute under which plaintiff's rights of action originated sets thereto, except that courts of sister states cannot be thus prevented from taking jurisdiction in such cases.[118]

However, the modern doctrine permits a forum state with sufficient contacts with the parties or the matter in dispute to follow its own law. In *Allstate Ins. Co. v. Hague*,[119] the decedent was a Wisconsin resident who had died in an automobile accident within Wisconsin near the Minnesota border in the course of his daily employment commute to Wisconsin. He had three automobile insurance policies on three automobiles, each limited to $15,000. Following his death, his widow and personal representative moved to Minnesota, and she sued in that state. She sought to apply Minnesota law, under which she could "stack" or aggregate all three policies, permissible under Minnesota law but not allowed under Wisconsin law, where the insurance contracts had been made. The Court, in a divided opinion, permitted resort to Minnesota law, because of the number of contacts the state had with the matter. On the other hand, an earlier decision is in considerable conflict with *Hague*. There, a life insurance policy was executed in New York, on a New York insured, with a New York beneficiary. The insured died in New York, and his beneficiary moved to Georgia and sued to recover on the policy. The insurance company defended on the ground that the insured, in the application for the policy, had made materially false statements that rendered it void under New York law. The defense was good under New York law, impermissible under Georgia law, and Georgia's decision to apply its own law was overturned, the Court stressing the surprise to the parties of the resort to the law of another state and the absence of any occurrence in Georgia to which its law could apply.[120]

Stockholder Corporation Relationship.—The protections of the Full Faith and Credit Clause extend beyond transitory actions. Some legal relationships are so complex, the Court holds, that the law under which they were formed ought always to govern them as long as they persist.[121] One such relationship is that of a stockholder and his corporation. Hence, if a question arises as to the liability of the stockholders of a corporation, the courts of the forum

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[118] Northern Pacific R.R. v. Babcock, 154 U.S. 190 (1894); Atchison, T. & S.F. Ry. v. Sowers, 213 U.S. 55, 67 (1909).

[119] 449 U.S. 302 (1981). *See also* Clay v. Sun Ins. Office, 377 U.S. 179 (1964).

[120] John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).

[121] Modern Woodmen v. Mixer, 267 U.S. 544 (1925).

state are required by the Full Faith and Credit Clause to determine the question in accordance with the constitution, laws and judicial decisions of the corporation's home states.[122] Illustrative applications of the latter rule are to be found in the following cases. A New Jersey statute forbidding an action at law to enforce a stockholder's liability arising under the laws of another state and providing that such liability may be enforced only in equity, and that in such a case the corporation, its legal representatives, all its creditors, and stockholders, should be necessary parties, was held not to preclude an action at law in New Jersey by the New York superintendent of banks against 557 New Jersey stockholders in an insolvent New York bank to recover assessments made under the laws of New York.[123] Also, in a suit to enforce double liability, brought in Rhode Island against a stockholder in a Kansas trust company, the courts of Rhode Island were held to be obligated to extend recognition to the statutes and court decisions of Kansas whereunder it is established that a Kansas judgment recovered by a creditor against the trust company is not only conclusive as to the liability of the corporation but also an adjudication binding each stockholder therein. The only defenses available to the stockholder are those which he could make in a suit in Kansas.[124]

Fraternal Benefit Society: Member Relationship.—The same principle applies to the relationship that is formed when one takes out a policy in a "fraternal benefit society." Thus, in *Royal Arcanum v. Green*,[125] in which a fraternal insurance association chartered under the laws of Massachusetts had been sued in the courts of New York by a citizen of the latter state on a contract of insurance made in that state, the Court held that the defendant company was entitled under the full faith and credit clause to have the case determined in accordance with the laws of Massachusetts and its own constitution and by-laws as these had been construed by the Massachusetts courts.

Nor has the Court manifested any disposition to depart from this rule. In *Sovereign Camp v. Bolin*,[126] it declared that a state in which a certificate of life membership of a foreign fraternal benefit association is issued, which construes and enforces the certificate according to its own law rather than according to the law of the

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[122] Converse v. Hamilton, 224 U.S. 243 (1912); Selig v. Hamilton, 234 U.S. 652 (1914); Marin v. Augedahl, 247 U.S. 142 (1918).

[123] Broderick v. Rosner, 294 U.S. 629 (1935). *See also* Thormann v. Frame, 176 U.S. 350, 356 (1900); Reynolds v. Stockton, 140 U.S. 254, 264 (1891).

[124] Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900).

[125] 237 U.S. 531 (1915), followed in Modern Woodmen v. Mixer, 267 U.S. 544 (1925).

[126] 305 U.S. 66, 75, 79 (1938).

state in which the association is domiciled, denies full faith and credit to the association's charter embodied in the status of the domiciliary state as interpreted by the latter's court. "The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. [Hence] another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of domicile." Consistent with that, the Court also held, in *Order of Travelers v. Wolfe*,[127] that South Dakota, in a suit brought therein by an Ohio citizen against an Ohio benefit society, must give effect to a provision of the constitution of the society prohibiting the bringing of an action on a claim more than six months after disallowance by the society, notwithstanding that South Dakota's period of limitation was six years and that its own statutes voided contract stipulations limiting the time within which rights may be enforced. Objecting to these results, Justice Black dissented on the ground that fraternal insurance companies are not entitled, either by the language of the Constitution, or by the nature of their enterprise, to such unique constitutional protection.

Insurance Company, Building and Loan Association: Contractual Relationships.—Whether or not distinguishable by nature of their enterprise, stock and mutual insurance companies and mutual building and loan associations, unlike fraternal benefit societies, have not been accorded the same unique constitutional protection; with few exceptions,[128] they have had controversies arising out of their business relationships settled by application of the law of the forum state. In *National Mutual B. & L. Ass'n v. Brahan*,[129] the principle applicable to these three forms of business organizations was stated as follows: where a corporation has become localized in a state and has accepted the laws of the state as a condition of doing business there, it cannot abrogate those laws by attempting to make contract stipulations, and there is no violation of the Full Faith and Credit Clause in instructing a jury to find according to local law notwithstanding a clause in a contract that it should be construed according to the laws of another state.

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[127] 331 U.S. 586, 588–89, 637 (1947).

[128] New York Life Ins. Co. v. Head, 234 U.S. 149 (1914); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924).

[129] 193 U.S. 635 (1904).

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Thus, the Court held in *Brahan*, when a Mississippi borrower, having repaid a mortgage loan to a New York building and loan association, sued in a Mississippi court to recover, as usurious, certain charges collected by the association, the usury law of Mississippi rather than that of New York controlled. In this case, the loan contract, which was negotiated in Mississippi subject to approval by the New York office, did not expressly state that it was governed by New York law. Similarly, when the New York Life Insurance Company, which had expressly stated in its application and policy forms that they would be controlled by New York law, was sued in Missouri on a policy sold to a resident thereof, the court of that state was sustained in its application of Missouri, rather than New York law.[130] Also, in an action in a federal court in Texas to collect the amount of a life insurance policy which had been made in New York and later changed by instruments assigning beneficial interest, it was held that questions (1) whether the contract remained one governed by the law of New York with respect to rights of assignees, rather than by the law of Texas, (2) whether the public policy of Texas permits recovery by one named beneficiary who has no beneficial interest in the life of the insured, and (3) whether lack of insurable interest becomes material when the insurer acknowledges liability and pays the money into court, were questions of Texas law, to be decided according to Texas decisions.[131] Similarly, a state, by reason of its potential obligation to care for dependents of persons injured or killed within its limits, is conceded to have a substantial interest in insurance policies, wherever issued, which may afford compensation for such losses; accordingly, it is competent, by its own direct action statute, to grant the injured party a direct cause of action against the insurer of the tortfeasor, and to refuse to enforce the law of the state, in which the policy is issued or delivered, which recognizes as binding a policy stipulation which forbids direct actions until after the determination of the liability of the insured tortfeasor.[132]

Consistent with the latter holding are the following two involving mutual insurance companies. In *Pink v. A.A.A. Highway Ex-*

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[130] New York Life Ins. Co. v. Cravens, 178 U.S. 389 (1900). *See also* American Fire Ins. Co v. King Lumber Co., 250 U.S. 2 (1919).

[131] Griffin v. McCoach, 313 U.S. 498 (1941).

[132] Watson v. Employers Liability Corp., 348 U.S. 66 (1954). In Clay v. Sun Ins. Office, 363 U.S. 207 (1960), three dissenters, Justices Black, and Douglas, and Chief Justice Warren, would have resolved the constitutional issue which the Court avoided, and would have sustained application of the forum state's statute of limitations fixing a period in excess of that set forth in the policy.

press,[133] the New York insurance commissioner, as a statutory liquidator of an insolvent auto mutual company organized in New York, sued resident Georgia policyholders in a Georgia court to recover assessments alleged to be due by virtue of their membership in it. The Supreme Court held that, although by the law of the state of incorporation, policyholders of a mutual insurance company become members thereof and as such liable to pay assessments adjudged to be required in liquidation proceedings in that state, the courts of another state are not required to enforce such liability against local resident policyholders who did not appear and were not personally served in the foreign liquidation proceedings but are free to decide according to local law the questions whether, by entering into the policies, residents became members of the company. Again, in *State Farm Ins. Co. v. Duel*,[134] the Court ruled that an insurance company chartered in State A, which does not treat membership fees as part of premiums, cannot plead denial of full faith and credit when State B, as a condition of entry, requires the company to maintain a reserve computed by including membership fees as well as premiums received in all states. Were the company's contention accepted, "no State," the Court observed, "could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation." It is not apparent, the Court added, that State A has an interest superior to that of State B in the financial soundness and stability of insurance companies doing business in State B.

Workers' Compensation Statutes.—Finally, the relationship of employer and employee, insofar as the obligations of the one and the rights of the other under worker's compensation acts are concerned, has been the subject of differing and confusing treatment. In an early case, the injury occurred in New Hampshire, resulting in death to a workman who had entered the defendant company's employ in Vermont, the home state of both parties. The Court required the New Hampshire courts to respect a Vermont statute which precluded a worker from bringing a common-law action against his employer for job related injuries where the employment relation was formed in Vermont, prescribing a constitutional rule giving priority to the place of the establishment of the employment relationship

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[133] 314 U.S. 201, 206–08 (1941). However, a decree of a Montana Supreme Court, insofar as it permitted judgment creditors of a dissolved Iowa surety company to levy execution against local assets to satisfy judgment, as against title to such assets of the Iowa insurance commissioner as statutory liquidator and successor to the dissolved company, was held to deny full faith and credit to the statutes of Iowa. Clark v. Williard, 292 U.S. 112 (1934).

[134] 324 U.S. 154, 159–60 (1945).

over the place of injury.[135] The same result was achieved in a subsequent case, but the Court promulgated a new rule, applied thereafter, which emphasized a balancing of the governmental interests of each jurisdiction, rather than the mere application of the statutory rule of one or another state under full faith and credit.[136] Thus, the Court held that the clause did not preclude California from disregarding a Massachusetts's workmen's compensation statute, making its law exclusive of any common law action or any law of any other jurisdiction, and applying its own act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment.[137] It is therefore settled that an injured worker may seek a compensation award either in the state in which the injury occurred or in the state in which the employee resided, his employer was principally located, and the employment relation was formed, even if one statute or the other purported to confer an exclusive remedy on the workman.[138]

Less settled is the question whether a second state, with interests in the matter, may supplement a workers' compensation award provided in the first state. At first, the Court ruled that a Louisiana employee of a Louisiana employer, who was injured on the job in Texas and who received an award under the Texas act, which did not grant further recovery to an employee who received compensation under the laws of another state, could not obtain additional compensation under the Louisiana statute.[139] Shortly, however, the Court departed from this holding, permitting Wisconsin, the state of the injury, to supplement an award pursuant to the laws of Illinois, where the worker resided and where the employment contract had been entered into.[140] Although the second case could have been factually distinguished from the first,[141] the Court instead chose to depart from the principle of the first, saying that only if the laws of the first state making an award contained "unmistakable lan-

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[135] Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932).

[136] Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935). The state where the employment contract was made was permitted to apply its workmen's compensation law despite the provision in the law of the state of injury making its law the exclusive remedy for injuries occurring there. *See* id. at 547 (stating the balancing test).

[137] Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939).

[138] In addition to *Alaska Packers* and Pacific Ins., *see* Carroll v. Lanza, 349 U.S. 408 (1955); Cardillo v. Liberty Mutual Co., 330 U.S. 469 (1947); Crider v. Zurich Ins. Co., 380 U.S. 39 (1965); Nevada v. Hall, 440 U.S. 410, 421–24 (1979).

[139] Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).

[140] Industrial Comm'n v. McCartin, 330 U.S. 622 (1947).

[141] Employer and employee had entered into a contract of settlement under the Illinois act, the contract expressly providing that it did not affect any rights the employee had under Wisconsin law. 330 U.S. at 624.

guage" to the effect that those laws were exclusive of any remedy under the laws of any other state would supplementary awards be precluded.[142] Although the overwhelming number of state court decisions since follow *McCartin*, and *Magnolia* has been little noticed, all the Justices expressed dissatisfaction with the former case as a rule of the Full Faith and Credit Clause, although a majority of the Court followed it and permitted a supplementary award.[143]

Full Faith and Credit and Statutes of Limitation.—The Full Faith and Credit Clause is not violated by a state statute providing that all suits upon foreign judgments shall be brought within five years after such judgment shall have been obtained, where the statute has been construed by the state courts as barring suits on foreign judgments, only if the plaintiff could not revive his judgment in the state where it was originally obtained.[144]

FULL FAITH AND CREDIT: MISCELLANY

Full Faith and Credit in Federal Courts

The rule of 28 U.S.C. §§ 1738–1739 pertains not merely to recognition by state courts of the records and judicial proceedings of courts of sister states but to recognition by "every court within the United States," including recognition of the records and proceedings of the courts of any territory or any country subject to the jurisdiction of the United States. The federal courts are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states.[145] Where suits to enforce the laws of one state are entertained in courts of another on principles of comity, federal district courts sitting in that state may entertain them and

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[142] 330 U.S. at 627–28, 630.

[143] Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980). For the disapproval of *McCartin*, *see* id. at 269–72 (plurality opinion of four), 289 (concurring opinion of three), 291 (dissenting opinion of two). But the four Justice plurality would have instead overruled *Magnolia*, id. at 277–86, and adopted the rule of interest balancing used in deciding which state may apply its laws in the first place. The dissenting two Justices would have overruled *McCartin* and followed *Magnolia*. Id. at 290. The other Justices considered *Magnolia* the sounder rule but decided to follow *McCurtin* because it could be limited to workmen's compensation cases, thus requiring no evaluation of changes throughout the reach of the Full Faith and Credit Clause. Id. at 286.

[144] Watkins v. Conway, 385 U.S. 188, 190–91 (1965).

[145] Cooper v. Newell, 173 U.S. 555, 567 (1899), *See also* Pennington v. Gibson, 57 U.S. (16 How.) 65, 81 (1854); Cheever v. Wilson, 76 U.S. (9 Wall.) 108, 123 (1870); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291 (1888); Swift v. McPherson, 232 U.S. 51 (1914); Baldwin v. Traveling Men's Ass'n, 283 U.S. 522 (1931); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Sanders v. Fertilizer Works, 292 U.S. 190 (1934); Durfee v. Duke, 375 U.S. 106 (1963); Allen v. McCurry, 449 U.S. 90 (1980); Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982).

should, if they do not infringe federal law or policy.[146] However, the refusal of a territorial court in Hawaii, which had jurisdiction of the action on a policy issued by a New York insurance company, to admit evidence that an administrator had been appointed and a suit brought by him on a bond in the federal court in New York in which no judgment had been entered, did not violate this clause.[147]

The power to prescribe the effect to be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those that declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgment of its courts is coextensive with its territorial jurisdiction.[148]

Evaluation Of Results Under Provision

The Court, after according an extrastate operation to statutes and judicial decisions in favor of defendants in transitory actions, proceeded next to confer the same protection upon certain classes of defendants in local actions in which the plaintiff's claim was the outgrowth of a relationship formed extraterritorially. But can the Court stop at this point? If it is true, as Chief Justice Marshall once remarked, that "the Constitution was not made for the benefit of plaintiffs alone," so also it is true that it was not made for the benefit of defendants alone. The day may come when the Court will approach the question of the relation of the Full Faith and Credit Clause to the extrastate operation of laws from the same angle as it today views the broader question of the scope of state legislative power. When and if this day arrives, state statutes and judicial decisions will be given such extraterritorial operation as seems reasonable to the Court to give them. In short, the rule of the dominance of legal policy of the forum state will be superseded by that of judicial review.[149]

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[146] Milwaukee County v. White Co., 296 U.S. 268 (1935).

[147] Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902). *See also* Gibson v. Lyon, 115 U.S. 439 (1885).

[148] Embry v. Palmer, 107 U.S. 3, 9 (1883). *See also* Northern Assurance Co. v. Grand View Ass'n, 203 U.S. 106 (1906); Louisville & Nashville R.R. v. Stock Yards Co., 212 U.S. 132 (1909); Atchison, T. & S.F. Ry. v. Sowers, 213 U.S. 55 (1909); West Side R.R. v. Pittsburgh Const. Co., 219 U.S. 92 (1911); Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924).

[149] Reviewing some of the cases treated in this section, a writer in 1926 said: "It appears, then, that the Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity

Sec. 1—Full Faith and Credit

The question arises whether the application to date, not by the Court alone but by Congress as well, of Article IV, § 1, can be said to have met the expectations of its Framers. In the light of some things said at the time of the framing of the clause, this may be doubted. The protest was raised against the clause that, in vesting Congress with power to declare the effect state laws should have outside the enacting state, it enabled the new government to usurp the powers of the states, but the objection went unheeded. The main concern of the Convention, undoubtedly, was to render the judgments of the state courts in civil cases effective throughout the Union. Yet even this object has been by no means completely realized, owing to the doctrine of the Court, that before a judgment of a state court can be enforced in a sister state, a new suit must be brought on it in the courts of the latter, and the further doctrine that with respect to such a suit, the judgment sued on is only evidence; the logical deduction from this proposition is that the sister state is under no constitutional compulsion to give it a forum. These doctrines were first clearly stated in *McElmoyle* and flowed directly from the new states' rights premises of the Court, but they are no longer in harmony with the prevailing spirit of constitutional construction nor with the needs of the times. Also, the clause seems always to have been interpreted on the basis of the assumption that the term "judicial proceedings" refers only to final judgments and does not include intermediate processes and writs, but the assumption would seem to be groundless, and if it is, then Congress has the power under the clause to provide for the service and execution throughout the United States of the judicial processes of the several states.

SCOPE OF POWERS OF CONGRESS UNDER PROVISION

Under the present system, suit ordinarily must be brought where the defendant, the alleged wrongdoer, resides, which means generally where no part of the transaction giving rise to the action took place. What could be more irrational? "Granted that no state can of its own volition make its process run beyond its borders . . . is it unreasonable that the United States should by federal action be made a unit in the manner suggested?" [150]

Indeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the Full

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in the field of conflicts . . . although the precise circumstances under which it will regard itself as having jurisdiction for this purpose are far from clear." Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 562 (1926). It can hardly be said that the law has been subsequently clarified on this point.

[150] Cook, *The Power of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 430 (1919).

Faith and Credit Clause. Congress has the power under the clause to decree the effect that the statutes of one state shall have in other states. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of state legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

JUDGMENTS OF FOREIGN STATES

Doubtless Congress, by virtue of its powers in the field of foreign relations, might also lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States. At present the duty to recognize judgments even in national courts rests only on comity and is qualified in the judgment of the Supreme Court, by a strict rule of parity.[151]

SECTION 2. Clause 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

Origin and Purpose

"The primary purpose of this clause, like the clauses between which it is located . . . was to help fuse into one Nation a collection of independent sovereign States." [152] Precedent for this clause was a much

[151] No right, privilege, or immunity is conferred by the Constitution in respect to judgments of foreign states and nations. Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912). *See also* Hilton v. Guyot, 159 U.S. 113, 234 (1895), where a French judgment offered in defense was held not a bar to the suit. Four Justices dissented on the ground that "the application of the doctrine of *res judicata* does not rest in discretion; and it is for the Government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." At the same sitting of the Court, an action in a United States circuit court on a Canadian judgment was sustained on the same ground of reciprocity, Ritchie v. McMullen, 159 U.S. 235 (1895). *See also* Ingenohl v. Olsen & Co., 273 U.S. 541 (1927), where a decision of the Supreme Court of the Philippine Islands was reversed for refusal to enforce a judgment of the Supreme Court of the British colony of Hong Kong, which was rendered "after a fair trial by a court having jurisdiction of the parties." Another instance of international cooperation in the judicial field is furnished by letters rogatory. *See* 28 U.S.C. § 1781. Several States have similar provisions, 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 108–109 (1906).

[152] Toomer v. Witsell, 334 U.S. 385, 395 (1948).

wordier and a somewhat unclear [153] clause of the Articles of Confederation. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . ." [154] In the Convention, the present clause was presented, reported by the Committee on Detail, and adopted all in the language ultimately approved.[155] Little commentary was addressed to it,[156] and we may assume with Justice Miller that "[t]here can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase." [157] At least four theories have been proffered regarding the purpose of this clause. First, the clause is a guaranty to the citizens of the different states of equal treatment by Congress; in other words, it is a species of equal protection clause binding on the National Government. Though it received some recognition in the *Dred Scott* case,[158] particularly in the opinion of Justice Catron,[159] this theory is today obsolete.[160] Second, the

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[153] THE FEDERALIST, No. 42 (J. Cooke ed. 1961), 285–286 (Madison).

[154] 1 F. Thorpe ed., *The Federal and State Constitutions*, H. DOC. NO. 357, 59th Cong., 2d Sess. (1909), 10.

[155] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 173, 187, 443 (rev. ed. 1937).

[156] "It may be esteemed the basis of the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which its is founded." THE FEDERALIST, No. 80 (J. Cooke ed. 1961), 537–538 (Hamilton).

[157] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873).

[158] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[159] 60 U.S. at 518, 527–29.

[160] Today, the Due Process Clause of the Fifth Amendment imposes equal protection standards on the Federal Government. Bolling v. Sharpe, 347 U.S. 497 (1954); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969).

clause is a guaranty to the citizens of each state of the natural and fundamental rights inherent in the citizenship of persons in a free society, the privileges and immunities of free citizens, which no state could deny to citizens of other states, without regard to the manner in which it treated its own citizens. This theory found some expression in a few state cases [161] and best accords with the natural law-natural rights language of Justice Washington in *Corfield v. Coryell*.[162]

If it had been accepted by the Court, this theory might well have endowed the Supreme Court with a reviewing power over restrictive state legislation as broad as that which it later came to exercise under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, but it was firmly rejected by the Court.[163] Third, the clause guarantees to the citizen of any state the rights which he enjoys as such even when he is sojourning in another state; that is, it enables him to carry with him his rights of state citizenship throughout the Union, unembarrassed by state lines. This theory, too, the Court rejected.[164] Fourth, the clause merely forbids any state to discriminate against citizens of other states in favor of its own. It is this narrow interpretation that has become the settled one. "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other

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[161] Campbell v. Morris, 3 H. & McH. 288 (Md. 1797); Murray v. McCarty, 2 Munf. 373 (Va. 1811); Livingston v. Van Ingen, 9 Johns. Case. 507 (N.Y. 1812); Douglas v. Stephens, 1 Del. Ch. 465 (1821); Smith v. Moody, 26 Ind. 299 (1866).

[162] 6 Fed. Cas. 546, 550 (No. 3230) (C.C.E.D. Pa. 1823). (Justice Washington on circuit), quoted infra, "All Privileges and Immunities of Citizens in the Several States." "At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington." Hague v. CIO, 307 U.S. 496, 511 (1939) (Justice Roberts for the Court). This view of the clause was asserted by Justices Field and Bradley, *Slaughter House Cases*, 83 U.S. (16 Wall.) 97, 117–18 (1873) (dissenting opinions); Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746, 760 (1884) (Justice Field concurring), *but see infra*, and was possibly understood so by Chief Justice Taney. Scott v. Sandford, 60 U.S. (19 How.) 393, 423 (1857). *See also* id. at 580 (Justice Curtis dissenting). The natural rights concept of privileges and immunities was strongly held by abolitionists and their congressional allies who drafted the similar clause into 1 of the Fourteenth Amendment. Graham, *Our 'Declaratory' Fourteenth Amendment*, reprinted in H. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism 295 (1968).

[163] McKane v. Durston, 153 U.S. 684, 687 (1894); *see also* cases cited infra.

[164] City of Detroit v. Osborne, 135 U.S. 492 (1890).

States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." [165]

The recent cases emphasize that interpretation of the clause is tied to maintenance of the Union. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." [166] Although the clause "was intended to create a national economic union," it also protects noneconomic interests relating to the Union.[167]

Hostile discrimination against all nonresidents infringes the clause,[168] but controversies between a state and its own citizens are not covered by the provision.[169] However, a state discrimination in favor of residents of one of its municipalities implicates the clause, even though the disfavored class consists of in-state as well as out-of-state inhabitants.[170] The clause should not be read so literally, the Court held, as to permit states to exclude out-of-state residents from benefits through the simple expediency of delegating authority to political subdivisions.[171] A violation can occur whether or not a statute explicitly discriminates against out-of-state interests.[172]

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[165] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (Justice Field for the Court; *but see* supra); *see also Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873); Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907); Whitfield v. Ohio, 297 U.S. 431 (1936).

[166] Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978). *See also* Austin v. New Hampshire, 420 U.S. 656, 660–65 (1975) (clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." Id. at 662); Hicklin v. Orbeck, 437 U.S. 518, 523–24 (1978).

[167] Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281–82 (1985). *See also* Doe v. Bolton, 410 U.S. 179, 200 (1973) (discrimination against out-of-state residents seeking medical care violates clause).

[168] Blake v. McClung, 172 U.S. 239, 246 (1898); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

[169] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1873); Cove v. Cunningham, 133 U.S. 107 (1890). *But see* Zobel v. Williams, 457 U.S. 55, 71 (1982) (Justice O'Connor concurring).

[170] United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

[171] 465 U.S. at 217. The holding illustrates what the Court has referred to as the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause. Supreme Court of New Hampshire v. Piper, 470 U.S.

How Implemented

The Privileges and Immunities Clause is self-executory, that is to say, its enforcement is dependent upon the judicial process. It does not authorize penal legislation by Congress. Federal statutes prohibiting conspiracies to deprive any person of rights or privileges secured by state laws,[173] or punishing infractions by individuals of the right of citizens to reside peacefully in the several states and to have free ingress into and egress from such states,[174] have been held void.

Citizens of Each State

A question much mooted before the Civil War was whether the term could be held to include free Negroes. In the *Dred Scott* case,[175] the Court answered it in the negative. "Citizens of each State," Chief Justice Taney argued, meant citizens of the United States as understood at the time the Constitution was adopted, and Negroes were not then regarded as capable of citizenship. The only category of national citizenship added under the Constitution comprised aliens, naturalized in accordance with acts of Congress.[176] In dissent, Justice Curtis not only denied the Chief Justice's assertion that there were no Negro citizens of states in 1789 but further argued that, although Congress alone could determine what classes of aliens should be naturalized, the states retained the right to extend citizenship to classes of persons born within their borders who had not previously enjoyed citizenship and that one upon whom state citizenship was thus conferred became a citizen of the state in the full sense of the Constitution.[177] So far as persons born in the United States, and subject to the jurisdiction thereof are concerned, the question was put at rest by the Fourteenth Amendment.

Corporations.—At a comparatively early date, the claim was made that a corporation chartered by a state and consisting of its citizens was entitled to the benefits of the comity clause in the transaction of business in other states. It was argued that the Court was

274, 280 n.8 (1985) (quoting Hicklin v. Orbeck, 437 U.S. 518, 531 (1978)). *See*, *e.g.*, Dean Milk Co. v. City of Madison, 424 U.S. 366 (1976) (city protectionist ordinance that disadvantages both out-of-state producers and some in-state producers violates the Commerce Clause).

[172] "[A]bsence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a] claim." Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 67 (2003).

[173] United States v. Harris, 106 U.S. 629, 643 (1883). *See also* Baldwin v. Franks, 120 U.S. 678 (1887).

[174] United States v. Wheeler, 254 U.S. 281 (1920).

[175] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[176] 60 U.S. at 403–11.

[177] 60 U.S. at 572–90.

bound to look beyond the act of incorporation and see who were the incorporators. If it found these to consist solely of citizens of the incorporating state, it was bound to permit them through the agency of the corporation to exercise in other states such privileges and immunities as the citizens thereof enjoyed. In *Bank of Augusta v. Earle*,[178] this view was rejected. The Court held that the comity clause was never intended "to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself." [179] A similar result was reached in *Paul v. Virginia*,[180] but by a different course of reasoning. The Court there held that a corporation, in this instance, an insurance company, was "the mere creation of local law" and could "have no legal existence beyond the limits of the sovereignty" [181] which created it; even recognition of its existence by other states rested exclusively in their discretion. Later recent cases held that this discretion is qualified by other provisions of the Constitution notably the Commerce Clause and the Fourteenth Amendment.[182] By reason of its similarity to the corporate form of organization, a Massachusetts trust has been denied the protection of this clause.[183]

All Privileges and Immunities of Citizens in the Several States

The classical judicial exposition of the meaning of this phrase is that of Justice Washington in *Corfield v. Coryell*,[184] which was decided by him on circuit in 1823. The question at issue was the validity of a New Jersey statute that prohibited "any person who is not, at the time, an actual inhabitant and resident in this State" from raking or gathering "clams, oysters or shells" in any of the waters of the state, on board any vessel "not wholly owned by some person, inhabitant of and actually residing in this State. . . . The inquiry is," wrote Justice Washington, "what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to

[178] 38 U.S. (13 Pet.) 519 (1839).
[179] 38 U.S. at 586.
[180] 75 U.S. (8 Wall.) 168 (1869).
[181] 75 U.S. at 181.
[182] Crutcher v. Kentucky, 141 U.S. 47 (1891).
[183] Hemphill v. Orloff, 277 U.S. 537 (1928).
[184] 6 Fed. Cas. 546 (No. 3,230) (C.C.E.D. Pa., 1823).

the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union . . . ." [185] He specified the following rights as answering this description: "Protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government must justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefits of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State . . . ." [186]

After thus defining broadly the private and personal rights which were protected, Justice Washington went on to distinguish them from the right to a share in the public patrimony of the state. "[W]e cannot accede" the opinion proceeds, "to the proposition . . . that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all other States the same advantages as are secured to their own citizens." [187] The right of a state to the fisheries within its borders he then held to be in the nature of a property right, held by the state "for the use of the citizens thereof;" the state was under no obligation to grant "co-tenancy in the common property of the State, to the citizens of all the other States." [188] The precise holding of this case was confirmed in *McCready v. Virginia*; [189] the logic of *Geer v. Connecticut* [190] extended the same rule to wild game, and *Hudson Water Co. v. McCarter* [191] applied it to the running water of a state. In *Toomer v. Witsell*,[192] however, the Court refused to apply this rule to free-swimming fish caught in the three-mile belt off the coast of South Carolina. It held instead that "commercial shrimping in the

[185] 6 Fed. Cas. at 551–52.
[186] 6 Fed. Cas. at 552.
[187] 6 Fed. Cas. at 552.
[188] 6 Fed. Cas. at 552.
[189] 94 U.S. 391 (1877).
[190] 161 U.S. 519 (1896).
[191] 209 U.S. 349 (1908).
[192] 334 U.S. 385 (1948).

marginal sea, like other common callings, is within the purview of the privileges and immunities clause" and that a severely discriminatory license fee exacted from nonresidents was unconstitutional.[193]

The virtual demise of the state ownership theory of animals and natural resources[194] compelled the Court to review and revise its mode of analysis of state restrictions that distinguished between residents and nonresidents[195] in respect to hunting and fishing and working with natural resources. A two-pronged test emerged. First, the Court held, it must be determined whether an activity in which a nonresident wishes to engage is within the protection of the clause. Such an activity must be "fundamental," must, that is, be essential or basic, "interference with which would frustrate the purposes of the formation of the Union, . . . " Justice Washington's opinion on Circuit in *Coryell* afforded the Court the standard; while recognizing that the opinion relied on notions of natural rights, the Court thought he used the term "fundamental" in the modern sense as well. Such activities as the pursuit of common callings within the state, the ownership and disposition of privately held property within the state, and the access to the courts of the state, had been recognized in previous cases as fundamental and protected against unreasonable burdening; but sport and recreational hunting, the issue in the particular case, was not a fundamental activity. It had nothing to do with one's livelihood and implicated no other interest recognized as fundamental.[196] Subsequent cases have recognized that the right to practice law[197] and the right to seek employment on public contracts[198] are to be considered fundamental activity. Contrariwise, accessing public records through a state freedom of infor-

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[193] 334 U.S. at 403. In Mullaney v. Anderson, 342 U.S. 415 (1952), an Alaska statute providing for the licensing of commercial fishermen in territorial waters and levying a license fee of $50.00 on nonresident and only $5.00 on resident fishermen was held void under Art. IV, § 2 on the authority of Toomer v. Witsell.

[194] The cases arose in the Commerce Clause context. *See* Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977) (dictum). Geer v. Connecticut, 161 U.S. 519 (1896), was overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979); Hudson Water Co. v. McCarter, 209 U.S. 349 (1908), was overruled in Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982).

[195] Although the clause specifically refers to "citizens," the Court treats the terms "citizens" and "residents" as "essentially interchangeable." Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975); Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978).

[196] Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 387 (1978).

[197] Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

[198] United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

mation act was held not to be a fundamental activity, and a state may limit such access to its own citizens.[199]

Second, finding a fundamental interest protected under the clause, in the particular case the right to pursue an occupation or common calling, the Court used a two-pronged analysis to determine whether the state's distinction between residents and nonresidents was justified. Thus, the state was compelled to show that nonresidents constituted a peculiar source of the evil at which the statute was aimed and that the discrimination bore a substantial relationship to the particular "evil" they are said to represent, *e.g.*, that it is "closely tailored" to meet the actual problem. An Alaska statute giving residents preference over nonresidents in hiring for work on the oil and gas pipelines within the state failed both elements of the test.[200] No state justification for exclusion of new residents from the practice of law on grounds not applied to long-term residents has been approved by the Court.[201]

Universal practice has also established a political exception to the clause to which the Court has given its approval. "A State may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office." [202]

Discrimination in Private Rights

Not only has judicial construction of the comity clause excluded certain privileges of a public nature from its protection, but the courts also have established the proposition that the purely private and

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[199] McBurney v. Young, 569 U.S. ___, No. 12–17, slip op. at 4 (2013). The Court further found that any incidental burden on a nonresident's ability to earn a living, own property, or exercise another "fundamental" activity could largely be ameliorated by using other available authorities. The Court emphasized that the primary purpose of the state freedom of information act was to provide state citizens with a means to obtain an accounting of their public officials.

[200] Hicklin v. Orbeck, 437 U.S. 518 (1978). Activity relating to pursuit of an occupation or common calling the Court recognized had long been held to be protected by the clause. The burden of showing constitutional justification was clearly placed on the state, id. at 526–28, rather than giving the statute the ordinary presumption of constitutionality. *See* Mullaney v. Anderson, 342 U.S. 415, 418 (1952).

[201] Barnard v. Thorstenn, 489 U.S. 546 (1989); Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985). For the application of this test, *see* Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 296–99 (1998).

[202] Blake v. McClung, 172 U.S. 239, 256 (1898). Of course as to suffrage, *see* Dunn v. Blumstein, 405 U.S. 330 (1972), but not as to candidacy, the principle is now qualified under the Equal Protection Clause of the Fourteenth Amendment. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (citing Kanapaux v. Ellisor, 419 U.S. 891 (1974); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd*, 414 U.S. 802 (1973)).

personal rights to which the clause admittedly extends are not in all cases beyond the reach of state legislation which differentiates citizens and noncitizens. Broadly speaking, these rights are held subject to the reasonable exercise by a state of its police power, and the Court has recognized that there are cases in which discrimination against nonresidents may be reasonably resorted to by a state in aid of its own public health, safety and welfare. To that end a state may reserve the right to sell insurance to persons who have resided within the state for a prescribed period of time.[203] It may require a nonresident who does business within the state[204] or who uses the highways of the state[205] to consent, expressly or by implication, to service of process on an agent within the state. Without violating this section, a state may limit the dower rights of a nonresident to lands of which the husband died seized while giving a resident dower in all lands held during the marriage,[206] or may leave the rights of nonresident married persons in respect of property within the state to be governed by the laws of their domicile, rather than by the laws it promulgates for its own residents.[207] But a state may not give a preference to resident creditors in the administration of the property of an insolvent foreign corporation.[208] An act of the Confederate Government, enforced by a state, to sequester a debt owed by one of its residents to a citizen of another state was held to be a flagrant violation of this clause.[209]

Access to Courts

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each state to the citizens of all other states to the same extent that it is allowed to its own citizens.[210] The constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms that, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically the same as those accorded to resident citizens.[211] The Supreme Court upheld a state statute of limitations that prevented a nonresident from suing in the state's courts after

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[203] La Tourette v. McMaster, 248 U.S. 465 (1919).

[204] Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[205] Hess v. Pawloski, 274 U.S. 352, 356 (1927).

[206] Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922), followed in Ferry v. Corbett, 258 U.S. 609 (1922).

[207] Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1856).

[208] Blake v. McClung, 172 U.S. 239, 248 (1898).

[209] Williams v. Bruffy, 96 U.S. 176, 184 (1878).

[210] Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 233 (1934).

[211] Canadian Northern Ry. v. Eggen, 252 U.S. 553 (1920).

expiration of the time for suit in the place where the cause of action arose [212] and another such statute which that suspended its operation as to resident plaintiffs, but not as to nonresidents, during the period of the defendant's absence from the state.[213] A state law making it discretionary with the courts to entertain an action by a nonresident of the state against a foreign corporation doing business in the state was sustained because it was applicable alike to citizens and noncitizens residing out of the state.[214] A statute permitting a suit in the courts of the state for wrongful death occurring outside the state, only if the decedent was a resident of the state, was sustained, because it operated equally upon representatives of the deceased whether citizens or noncitizens.[215] Being patently nondiscriminatory, a Uniform Reciprocal State Law to secure the attendance of witnesses from within or without a state in criminal proceedings, whereunder an Illinois resident, while temporarily in Florida, was summoned to appear at a hearing for determination as to whether he should be surrendered to a New York officer for testimony in the latter state, does not violate this clause.[216]

Taxation

In the exercise of its taxing power, a state may not discriminate substantially between residents and nonresidents. In *Ward v. Maryland*,[217] the Court set aside a state law that imposed specific taxes upon nonresidents for the privilege of selling within the state goods that were produced in other states. Also found to be incompatible with the comity clause was a Tennessee license tax, the amount of which was dependent upon whether the person taxed had his chief office within or without the state.[218] In *Travis v. Yale & Towne Mfg. Co.*,[219] the Court, although sustaining the right of a state to tax income accruing within its borders to nonresidents,[220] held the particular tax void because it denied to nonresidents exemptions which were allowed to residents. The "terms 'resident' and 'citizen' are not

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[212] 252 U.S. at 563.

[213] Chemung Canal Bank v. Lowery, 93 U.S. 72, 76 (1876).

[214] Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[215] Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907).

[216] New York v. O'Neill, 359 U.S. 1 (1959). Justices Douglas and Black dissented.

[217] 79 U.S. (12 Wall.) 418, 424 (1871). *See also* Downham v. Alexandria Council, 77 U.S. (10 Wall.) 173, 175 (1870).

[218] Chalker v. Birmingham & N.W. Ry., 249 U.S. 522 (1919).

[219] 252 U.S. 60 (1920).

[220] 252 U.S. at 62–64. *See also* Shaffer v. Carter, 252 U.S. 37 (1920). In Austin v. New Hampshire, 420 U.S. 656 (1975), the Court held void a state commuter income tax, inasmuch as the State imposed no income tax on its own residents and thus the tax fell exclusively on nonresidents' income and was not offset even approximately by other taxes imposed upon residents alone.

synonymous," wrote Justice Pitney, ". . . but a general taxing scheme . . . if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States . . . ."[221] Where there were no discriminations between citizens and noncitizens, a state statute taxing the business of hiring persons within the state for labor outside the state was sustained.[222]

The Court returned to the privileges-and-immunities restrictions upon disparate state taxation of residents and nonresidents in *Lunding v. New York Tax Appeals Tribunal*.[223] In this case, the state denied nonresidents any deduction from taxable income for alimony payments, although it permitted residents to deduct such payments. Although it observed that approximate equality between residents and nonresidents was required by the clause, the Court acknowledged that precise equality was neither necessary nor in most instances possible. But it was required of the challenged state that it demonstrate a "substantial reason" for the disparity, and the discrimination must bear a "substantial relationship" to that reason.[224] A state, under this analysis, may not deny nonresidents a general tax exemption provided to residents that would reduce their tax burdens, but it could limit specific expense deductions based on some relationship between the expenses and their in-state property or income. Here, the state flatly denied the exemption. Moreover, the Court rejected various arguments that had been presented, finding that most of those arguments, while they might support targeted denials or partial denials, simply reiterated the state's contention that it need not afford any exemptions at all. This section of the Constitution does not prevent a territorial government, exercising powers delegated by Congress, from imposing a discriminatory license tax on nonresident fishermen operating within its waters.[225]

However, what at first glance may appear to be a discrimination may turn out not to be when the entire system of taxation prevailing in the enacting state is considered. On the basis of overall fairness, the Court sustained a Connecticut statute that required nonresident stockholders to pay a state tax measured by the full market value of their stock while resident stockholders were subject to local taxation on the market value of that stock reduced by

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[221] 252 U.S. 60, 78–79 (1920).
[222] Williams v. Fears, 179 U.S. 270, 274 (1900).
[223] 522 U.S. 287 (1998).
[224] 522 U.S. at 298.
[225] Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1924).

the value of the real estate owned by the corporation.[226] Occasional or accidental inequality to a nonresident taxpayer is not sufficient to defeat a scheme of taxation whose operation is generally equitable.[227] In an early case the Court brushed aside as frivolous the contention that a state violated this clause by subjecting one of its own citizens to a property tax on a debt due from a nonresident secured by real estate situated where the debtor resided.[228]

Clause 2. A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

INTERSTATE RENDITION

Duty to Surrender Fugitives From Justice

Although this provision is not in its nature self-executing, and there is no express grant to Congress of power to carry it into effect, that body passed a law shortly after the Constitution was adopted, imposing upon the governor of each state the duty to deliver up fugitives from justice found in such state.[229] The Supreme Court has accepted this contemporaneous construction as establishing the validity of this legislation.[230] The duty to surrender is not absolute and unqualified; if the laws of the state to which the fugitive has fled have been put in force against him, and he is imprisoned there,

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[226] Travellers' Ins. Co. v. Connecticut, 185 U.S. 364, 371 (1902).

[227] Maxwell v. Bugbee, 250 U.S. 525 (1919).

[228] Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879). *Cf.* Colgate v. Harvey, 296 U.S. 404 (1935), in which discriminatory taxation of bank deposits outside the state owned by a citizen of the state was held to infringe a privilege of national citizenship, in contravention of the Fourteenth Amendment. Colgate v. Harvey was overruled by Madden v. Kentucky, 309 U.S. 83, 93 (1940).

[229] 1 Stat. 302 (1793), 18 U.S.C. § 3182. The Act requires rendition of fugitives at the request of a demanding "Territory," as well as of a State, thus extending beyond the terms of the clause. In New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909), the Court held that the legislative extension was permissible under the territorial clause. *See* Puerto Rico v. Branstad, 483 U.S. 219, 229–230 (1987).

[230] Roberts v. Reilly, 116 U.S. 80, 94 (1885). *See also* Innes v. Tobin, 240 U.S. 127 (1916). Justice Story wrote: "[T]he natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution"; and again, "it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby." Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618–19 (1842).

the demands of those laws may be satisfied before the duty of obedience to the requisition arises.[231] But, in *Kentucky v. Dennison*,[232] the Court held that this statute was merely declaratory of a moral duty; that the Federal Government "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,"[233] and consequently that a federal court could not issue a mandamus to compel the governor of one state to surrender a fugitive to another. Long considered a constitutional derelict, *Dennison* was finally formally overruled in 1987.[234] Now, states and territories may invoke the power of federal courts to enforce against state officers this and other rights created by federal statute, including equitable relief to compel performance of federally imposed duties.[235]

Fugitive From Justice Defined.—To be a fugitive from justice within the meaning of this clause, it is necessary that, in the regular course of judicial proceedings, one have been charged with a crime, but it is not necessary that one have left the state *after* having been charged. It is sufficient that, having been charged with a crime in one state, one is found in another state.[236] And the motive that induced the departure is immaterial.[237] Even if a fugitive were brought involuntarily into the state where found by requisition from another state, he may be surrendered to a third state upon an extradition warrant.[238] A person indicted a second time for the same offense is nonetheless a fugitive from justice by reason of the fact that after dismissal of the first indictment, on which he was originally indicted, he left the state with the knowledge of, or without objection by, state authorities.[239] But a defendant cannot be extradited if he was only constructively present in the demanding state

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[231] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873).

[232] 65 U.S. (24 How.) 66 (1861); *cf.* Prigg v. Pennsylvania 41 U.S. (16 Pet.) 539, 612 (1842).

[233] 65 U.S. (24 How.) 66, 107 (1861). Congress in 1934 plugged the loophole created by this decision by making it unlawful for any person to flee from one state to another for the purpose of avoiding prosecution in certain cases. 48 Stat. 782, 18 U.S.C. § 1073.

[234] Puerto Rico v. Branstad, 483 U.S. 219 (1987). "*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development." Id. at 230.

[235] 483 U.S. at 230.

[236] Roberts v. Reilly, 116 U.S. 80, 95 (1885). *See also* Strassheim v. Daily, 221 U.S. 280 (1911); Appleyard v. Massachusetts, 203 U.S. 222 (1906); *Ex parte* Reggel, 114 U.S. 642, 650 (1885).

[237] Drew v. Thaw, 235 U.S. 432, 439 (1914).

[238] Innes v. Tobin, 240 U.S. 127 (1916).

[239] Bassing v. Cady, 208 U.S. 386 (1908).

at the time of the commission of the crime charged.[240] For the purpose of determining who is a fugitive from justice, the words "treason, felony or other crime" embrace every act forbidden and made punishable by a law of a state,[241] including misdemeanors.[242]

Procedure for Removal.—Only after a person has been charged with a crime in the regular course of judicial proceedings is the governor of a state entitled to make demand for his return from another state.[243] The person demanded has no constitutional right to be heard before the governor of the state in which he is found on the question whether he has been substantially charged with crime and is a fugitive from justice.[244] The constitutionally required surrender is not to be interfered with by *habeas corpus* upon speculations as to what ought to be the result of a trial.[245] Nor is it proper thereby to inquire into the motives controlling the actions of the governors of the demanding and surrendering states.[246] Matters of defense, such as the running of the statute of limitations,[247] or the contention that continued confinement in the prison of the demanding state would amount to cruel and unjust punishment,[248] cannot be heard on *habeas corpus* but should be tested in the courts of the demanding state, where all parties may be heard, where all pertinent testimony will be readily available, and where suitable relief, if any, may be fashioned. A defendant will, however, be discharged on *habeas corpus* if he shows by clear and satisfactory evidence that he was outside the demanding state at the time of the crime.[249] If, however, the evidence is conflicting, *habeas corpus* is not a proper proceeding to try the question of alibi.[250] The *habeas* court's role is, therefore, very limited.[251]

Trial of Fugitives After Removal.—There is nothing in the Constitution or laws of the United States that exempts an offender,

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[240] Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903).

[241] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 103 (1861).

[242] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 375 (1873).

[243] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 104 (1861); Pierce v. Creecy, 210 U.S. 387 (1908). *See also Matter of Strauss*, 197 U.S. 324, 325 (1905); Marbles v. Creecy, 215 U.S. 63 (1909); Strassheim v. Daily, 221 U.S. 280 (1911).

[244] Munsey v. Clough, 196 U.S. 364 (1905); Pettibone v. Nichols, 203 U.S. 192 (1906).

[245] Drew v. Thaw, 235 U.S. 432 (1914).

[246] Pettibone v. Nichols, 203 U.S. 192 (1906).

[247] Biddinger v. Commissioner of Police, 245 U.S. 128 (1917). *See also* Rodman v. Pothier, 264 U.S. 399 (1924).

[248] Sweeney v. Woodall, 344 U.S. 86 (1952).

[249] Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903). *See also* South Carolina v. Bailey, 289 U.S. 412 (1933).

[250] Munsey v. Clough, 196 U.S. 364, 375 (1905).

[251] Michigan v. Doran, 439 U.S. 282, 289 (1978). In California v. Superior Court, 482 U.S. 400 (1987), the Court reiterated that extradition is a "summary procedure."

brought before the courts of a state for an offense against its laws, from trial and punishment, even though he was brought from another state by unlawful violence,[252] or by abuse of legal process,[253] and a fugitive lawfully extradited from another state may be tried for an offense other than that for which he was surrendered.[254] The rule is different, however, with respect to fugitives surrendered by a foreign government, pursuant to treaty. In that case the offender may be tried only "for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." [255]

Clause 3. No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

FUGITIVES FROM LABOR

This clause contemplated the existence of a positive unqualified right on the part of the owner of a slave which no state law could in any way regulate, control, or restrain. Consequently the owner of a slave had the same right to seize and repossess him in another state, as the local laws of his own state conferred upon him, and a state law that penalized such seizure was held unconstitutional.[256] Congress had the power and the duty, which it exercised by the Act of February 12, 1793,[257] to carry into effect the rights given by this section,[258] and the states had no concurrent power to legislate on the subject.[259] However, a state statute providing a penalty for harboring a fugitive slave was held not to conflict with this clause because it did not affect the right or remedy either of the

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[252] Ker v. Illinois, 119 U.S. 436, 444 (1886); Mahon v. Justice, 127 U.S. 700, 707, 712, 714 (1888).

[253] Cook v. Hart, 146 U.S. 183, 193 (1892); Pettibone v. Nichols, 203 U.S. 192, 215 (1906).

[254] Lascelles v. Georgia, 148 U.S. 537, 543 (1893).

[255] United States v. Rauscher, 119 U.S. 407, 430 (1886).

[256] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842).

[257] 1 Stat. 302 (1793).

[258] Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229 (1847); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

[259] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842).

master or the slave; by it the state simply prescribed a rule of conduct for its own citizens in the exercise of its police power.[260]

SECTION 3. Clause 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

DOCTRINE OF THE EQUALITY OF STATES

"Equality of constitutional right and power is the condition of all the States of the Union, old and new."[261] This doctrine, now a truism of constitutional law, did not find favor in the Constitutional Convention. That body struck out from this section, as reported by the Committee on Detail, two sections to the effect that "new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States concerning the public debt which shall be subsisting."[262] Opposing this action, Madison insisted that "the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States."[263] Nonetheless, after further expressions of opinion pro and con, the Convention voted nine states to two to delete the requirement of equality.[264]

Prior to this time, however, Georgia and Virginia had ceded to the United States large territories held by them, upon condition that new states should be formed therefrom and admitted to the Union on an equal footing with the original states.[265] Since the admission of Tennessee in 1796, Congress has included in each state's act of

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[260] Moore v. Illinois, 55 U.S. (14 How.) 13, 17 (1853).

[261] Escanaba Co. v. City of Chicago, 107 U.S. 678, 689 (1883).

[262] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 454 (rev. ed. 1937).

[263] Id.

[264] Id. The present provision was then adopted as a substitute. Id. at 455.

[265] Pollard v. Hagan, 44 U.S. (3 How.) 212, 221 (1845). The Continental Congress in responding in the Northwest Ordinance, on July 13, 1787, provided that when each of the designated states in the territorial area achieved a population of 60,000 free inhabitants it was to be admitted "on an equal footing with the original States, in all respects whatever." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. V*, 5 JOURNALS OF CONGRESS 752–754 (1823 ed.), reprinted in C. Tansill ed., *Documents Illustrative of the Formation of the Union of the American States*, H. DOC. NO. 398, 69th Cong., 1st Sess. (1927), 47, 54.

admission a clause providing that the state enters the Union "on an equal footing with the original States in all respects whatever." [266] With the admission of Louisiana in 1812, the principle of equality was extended to states created out of territory purchased from a foreign power.[267] By the Joint Resolution of December 29, 1845, Texas, then an independent Nation, "was admitted into the Union on an equal footing with the original States in all respects whatever." [268]

However, if the doctrine rested merely on construction of the declarations in the admission acts, then the conditions and limitations imposed by Congress and agreed to by the states in order to be admitted would nonetheless govern, since they must be construed along with the declarations. Again and again, however, in adjudicating the rights and duties of states admitted after 1789, the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union.[269] That the doctrine is of constitutional stature was made evident at least by the time of the decision in *Pollard's Lessee*, if not before.[270] *Pollard's Lessee* involved conflicting claims by the United States and Alabama of ownership of certain partially inundated lands on the shore of the Gulf of Mexico in Alabama. The enabling act for Alabama had contained both a declaration of equal footing and a reservation to the United States of these lands.[271] Rather than an issue of mere land ownership, the Court saw the question as one concerning sovereignty and jurisdiction of the states. Because the original states retained sovereignty and jurisdiction over the navigable waters and the soil beneath them within their boundaries, retention by the United States of either title to or jurisdiction over common lands in the new states would bring those states into the Union on less than an equal footing with the original states. This, the Court would not permit. "Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it, before she

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[266] 1 Stat. 491 (1796). Prior to Tennessee's admission, Vermont and Kentucky were admitted with different but conceptually similar terminology. 1 Stat. 191 (1791); 1 Stat. 189 (1791).

[267] 2 Stat. 701, 703 (1812).

[268] Justice Harlan, speaking for the Court, in United States v. Texas, 143 U.S. 621, 634 (1892) (citing 9 Stat. 108).

[269] Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 434 (1892); Knight v. U.S. Land Association, 142 U.S. 161, 183 (1891); Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65 (1873).

[270] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *See* Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 588 (1845).

[271] 3 Stat. 489, 492 (1819).

ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. . . . [T]o Alabama belong the navigable waters and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; *and no compact that might be made between her and the United States could diminish or enlarge these rights.*" [272]

Finally, in 1911, the Court invalidated a restriction on the change of location of the state capital, which Congress had imposed as a condition for the admission of Oklahoma, on the ground that Congress may not embrace in an enabling act conditions relating wholly to matters under state control.[273] In an opinion, from which Justices Holmes and McKenna dissented, Justice Lurton argued: "The power is to admit 'new States into this Union,' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission." [274]

The equal footing doctrine is generally a limitation upon the terms by which Congress admits a state.[275] That is, states must be admitted on an equal footing in the sense that Congress may not

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[272] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228–29 (1845) (emphasis supplied). *See also* id. at 222–23. A unanimous Court explained the rule on state ownership of navigable waters in PPL Montana, LLC v. Montana, 565 U.S. ___, No. 10–218, slip op. (2012). Under the equal footing doctrine, a State, upon entering the Union, gains title to the beds of waters then navigable or tidally influenced, subject only to federal powers under the Constitution (*e.g.*, the Commerce Clause). By contrast, the United States retains any title vested in it to lands beneath waters not then navigable or tidally influenced. For the distinct purpose of the equal footing doctrine, "navigable waters" are those waters used, or susceptible to use, for trade and travel by customary means at the time of statehood. Furthermore, the "navigability" of rivers is determined on a segment-by-segment basis, and lands under portions of a stream that were impassable at statehood were not conveyed by force of the doctrine.

[273] Coyle v. Smith, 221 U.S. 559 (1911).

[274] 221 U.S. at 567.

[275] *See* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966). However, in recent years the Court has relied on the general principle of "constitutional equality" among the states to strike down both federal and state laws. *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 578 U.S. ___, No. 14–1175, slip op. at 7 (2016); Shelby Cty. v. Holder, 570 U.S. ___, No. 12–96, slip op. at 9 (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

exact conditions solely as a tribute for admission, but it may, in the enabling or admitting acts or subsequently impose requirements that would be or are valid and effectual if the subject of congressional legislation after admission.[276] Thus, Congress may embrace in an admitting act a regulation of commerce among the states or with Indian tribes or rules for the care and disposition of the public lands or reservations within a state. "[I]n every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress." [277]

Until recently the requirement of equality has applied primarily to political standing and sovereignty rather than to economic or property rights.[278] Broadly speaking, every new state is entitled to exercise all the powers of government which belong to the original states of the Union.[279] It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its limits even as to federal lands, except where the Federal Government has reserved [280] or the state has ceded some degree of jurisdiction to the United States, and, of course, no state may enact a law that would conflict with the constitutional powers of the United States. Consequently, it has jurisdiction to tax private activities carried on within the public domain (although not to tax the Federal lands), if the tax does not constitute an unconstitutional burden on the Federal Government.[281] Statutes applicable to territories, *e.g.*, the Northwest Territory Ordinance of 1787, cease to have any operative force when the territory,

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[276] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224–25, 229–30 (1845); Coyle v. Smith, 221 U.S. 559, 573–74 (1911). *See also* Bolln v. Nebraska, 176 U.S. 83, 89 (1900); Ward v. Race Horse, 163 U.S. 504, 514 (1895); Escanaba Co. v. City of Chicago, 107 U.S. 678, 688 (1882); Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1857).

[277] Coyle v. Smith, 221 U.S. 559, 574 (1911). Examples include Stearns v. Minnesota, 179 U.S. 223 (1900) (congressional authority to dispose of and to make rules and regulations respecting the property of the United States); United States v. Sandoval, 231 U.S. 28 (1913) (regulating Indian tribes and intercourse with them); United States v. Chavez, 290 U.S. 357 (1933) (same); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9–10 (1888) (prevention of interference with navigability of waterways under Commerce Clause).

[278] United States v. Texas, 339 U.S. 707, 716 (1950); Stearns v. Minnesota, 179 U.S. 223, 245 (1900).

[279] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); McCabe v. Atchison T. & S.F. Ry., 235 U.S. 151 (1914).

[280] Van Brocklin v. Tennessee, 117 U.S. 151, 167 (1886).

[281] Wilson v. Cook, 327 U.S. 474 (1946).

or any part thereof, is admitted to the Union, except as adopted by state law.[282] When the enabling act contains no exclusion of jurisdiction as to crimes committed on Indian reservations by persons other than Indians, state courts are vested with jurisdiction.[283] But the constitutional authority of Congress to regulate commerce with Indian tribes is not inconsistent with the equality of new states,[284] and conditions inserted in the New Mexico Enabling Act forbidding the introduction of liquor into Indian territory were therefore valid.[285] Similarly, Indian treaty rights to hunt, fish, and gather on lands ceded to the Federal Government were not extinguished by statehood. These "usufructuary" rights were subject to reasonable state regulation, and hence were not irreconcilable with state sovereignty over natural resources.[286]

Admission of a state on an equal footing with the original states involves the adoption as citizens of the United States of those whom Congress makes members of the political community and who are recognized as such in the formation of the new state.[287]

Judicial Proceedings Pending on Admission of New States

Whenever a territory is admitted into the Union, the cases pending in the territorial court that are of exclusive federal cognizance are transferred to the federal court having jurisdiction over the area; cases not cognizable in the federal courts are transferred to the tribunals of the new state, and those over which federal and state courts have concurrent jurisdiction may be transferred either to the state or federal courts by the party possessing the option under existing law.[288] Where Congress neglected to make provision for disposition of certain pending cases in an enabling act for the admission of a state to the Union, a subsequent act supplying the omission was held valid.[289] After a case, begun in a United States court of a territory, is transferred to a state court under the operation of the en-

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[282] Permoli v. First Municipality, 44 U.S. (3 How.) 589, 609 (1845); Sands v. Manistee River Imp. Co., 123 U.S. 288, 296 (1887); *see also* Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1858); Huse v. Glover, 119 U.S. 543 (1886); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9 (1888); Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390 (1912).

[283] Draper v. United States, 164 U.S. 240 (1896), following United States v. McBratney, 104 U.S. 621 (1882).

[284] Dick v. United States, 208 U.S. 340 (1908); *Ex parte* Webb, 225 U.S. 663 (1912).

[285] United States v. Sandoval, 231 U.S. 28 (1913).

[286] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) (overruling Ward v. Race Horse, 163 U.S. 504 (1896)).

[287] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 170 (1892).

[288] Baker v. Morton, 79 U.S. (12 Wall.) 150, 153 (1871).

[289] Freeborn v. Smith, 69 U.S. (2 Wall.) 160 (1865).

abling act and the state constitution, the appellate procedure is governed by the state statutes and procedures.[290]

The new state, without the express or implied assent of Congress, cannot enact that the records of the former territorial court of appeals should become records of its own courts or provide by law for proceedings based thereon.[291]

Property Rights of States to Soil Under Navigable Waters

The "equal footing" doctrine has had an important effect on the property rights of new states to soil under navigable waters[292] and tidally influenced waters.[293] In *Pollard's Lessee v. Hagan*,[294] as was observed above, the Court held that the original states had reserved to themselves the ownership of the shores of navigable waters and the soils under them, and that under the principle of equality the title to the soils beneath navigable water passes to a new state upon admission. The principle of this case, which also applies to tidally influenced waters, supplies the rule of decision in many property-claims cases.[295]

After refusing to extend the inland-water rule of *Pollard's Lessee* to the three mile marginal belt under the ocean along the coast,[296] the Court applied the principle in reverse in *United States v. Texas*.[297] Because the original states had been found not to own the soil un-

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[290] John v. Paullin, 231 U.S. 583 (1913).

[291] Hunt v. Palao, 45 U.S. (4 How.) 589 (1846). *Cf.* Benner v. Porter, 50 U.S. (9 How.) 235, 246 (1850).

[292] "Navigable waters", for equal footing purposes, are those waters used, or susceptible to use, for trade and travel at the time of statehood. PPL Montana, LLC v. Montana, 565 U.S. ___, No. 10–218, slip op. at 11–13 (2012).

[293] *E.g.*, Knight v. U.S. Land Association, 142 U.S. 161, 183 (1891).

[294] 44 U.S. (3 How.) 212, 223 (1845). *See also* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

[295] *See* PPL Montana, LLC v. Montana, 565 U.S. ___, No. 10–218, slip op. (2012) (Montana not able to charge rent to hydroelectric facilities located on portions of rivers that were impassable when Montana became a State); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (confirming language in earlier cases recognizing state sovereignty over tidal but nonnavigable lands); Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (applying presumption against congressional intent to defeat state title to find inadequate federal reservation of lake bed); Idaho v. United States, 533 U.S. 262 (2001) (presumption rebutted by indications—some occurring after statehood—that Congress intended to reserve certain submerged lands for benefit of an Indian tribe); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (doctrine requires utilization of state common law rather than federal to determine ownership of land underlying river that is navigable but not an interstate boundary); Shively v. Bowlby, 152 U.S. 1 (1894) (whether Oregon or a pre-statehood grantee from the United States of riparian lands near mouth of Columbia River owned soil below high-water mark).

[296] United States v. California, 332 U.S. 19, 38 (1947); United States v. Louisiana, 339 U.S. 699 (1950).

[297] 339 U.S. 707, 716 (1950). *See* United States v. Maine, 420 U.S. 515 (1975) (unanimously reaffirming the California, Louisiana, and Texas cases).

der the three mile belt, Texas, which concededly did own this soil before its annexation to the United States, was held to have surrendered its dominion and sovereignty over it, upon entering the Union on terms of equality with the existing states. To this extent, the earlier rule that unless otherwise declared by Congress the title to every species of property owned by a territory passes to the state upon admission[298] has been qualified. However, when Congress, through passage of the Submerged Lands Act of 1953,[299] surrendered its paramount rights to natural resources in the marginal seas to certain states, without any corresponding cession to all states, the transfer was held to entail no abdication of national sovereignty over control and use of the oceans in a manner destructive of the equality of the states.[300]

While the territorial status continues, the United States has power to convey property rights, such as rights in soil below the high-water mark along navigable waters,[301] or the right to fish in designated waters,[302] which will be binding on the state.

Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

PROPERTY AND TERRITORY: POWERS OF CONGRESS

Methods of Disposing of Property

The Constitution is silent as to the methods of disposing of property of the United States. In *United States v. Gratiot*,[303] in which the validity of a lease of lead mines on government lands was put

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[298] Brown v. Grant, 116 U.S. 207, 212 (1886).

[299] 67 Stat. 29, 43 U.S.C. §§ 1301–1315.

[300] Alabama v. Texas, 347 U.S. 272, 274–77, 281 (1954). Justice Black and Douglas dissented.

[301] Shively v. Bowlby, 152 U.S. 1, 47 (1894). *See also* Joy v. St. Louis, 201 U.S. 332 (1906).

[302] United States v. Winans, 198 U.S. 371, 378 (1905); Seufert Bros. v. United States, 249 U.S. 194 (1919). A fishing right granted by treaty to Indians does not necessarily preclude the application to Indians of state game laws regulating the time and manner of taking fish. New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916). *See also* Metlakatla Indians v. Egan, 369 U.S. 45, 54, 57–59 (1962); Kake Village v. Egan, 369 U.S. 60, 64–65, 67–69, 75–76 (1962). But it has been held to be violated by exacting a license fee that is both regulatory and revenue-producing. Tulee v. Washington, 315 U.S. 681 (1942).

[303] 39 U.S. (14 Pet.) 526 (1840).

in issue, the contention was advanced that "disposal is not letting or leasing," and that Congress has no power "to give or authorize leases." The Court sustained the leases, saying "the disposal must be left to the discretion of Congress." [304] Nearly a century later this power to dispose of public property was relied upon to uphold the generation and sale of electricity by the Tennessee Valley Authority. The reasoning of the Court ran thus: the potential electrical energy made available by the construction of a dam in the exercise of its constitutional powers is property which the United States is entitled to reduce to possession; to that end it may install the equipment necessary to generate such energy. In order to widen the market and make a more advantageous disposition of the product, it may construct transmission lines and may enter into a contract with a private company for the interchange of electric energy.[305]

Public Lands: Federal and State Powers Thereover

No appropriation of public lands may be made for any purpose except by authority of Congress.[306] However, Congress was held to have acquiesced in the long-continued practice of withdrawing land from the public domain by Executive Orders.[307] In 1976 Congress enacted legislation that established procedures for withdrawals and that explicitly disclaimed continued acquiescence in any implicit executive withdrawal authority.[308] The comprehensive authority of Congress over public lands includes the power to prescribe the times, conditions, and mode of transfer thereof and to designate the persons to whom the transfer shall be made,[309] to declare the dignity and effect of titles emanating from the United States,[310] to determine the validity of grants which antedate the government's acquisition of the property,[311] to exempt lands acquired under the homestead laws from previously contracted debts,[312] to withdraw land

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[304] 39 U.S. at 533, 538.

[305] Ashwander v. TVA, 297 U.S. 288, 335–40 (1936). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

[306] United States v. Fitzgerald, 40 U.S. (15 Pet.) 407, 421 (1841). *See also* California v. Deseret Water, Oil & Irrigation Co., 243 U.S. 415 (1917); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).

[307] Sioux Tribe v. United States, 316 U.S. 317 (1942); United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915).

[308] Federal Land Policy and Management Act, Pub. L. 94–579, § 704(a); 90 Stat. 2792 (1976).

[309] Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872); *see also* Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858); Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902).

[310] Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839). *See also* Field v. Seabury, 60 U.S. (19 How.) 323, 332 (1857).

[311] Tameling v. United States Freehold & Immigration Co., 93 U.S. 644, 663 (1877). *See also Maxwell Land-Grant Case*, 121 U.S. 325, 366 (1887).

[312] Ruddy v. Rossi, 248 U.S. 104 (1918).

from settlement and to prohibit grazing thereon,[313] to prevent unlawful occupation of public property and to declare what are nuisances, as affecting such property, and provide for their abatement,[314] and to prohibit the introduction of liquor on lands purchased and used for an Indian colony.[315] Congress may limit the disposition of the public domain to a manner consistent with its views of public policy. A restriction inserted in a grant of public lands to a municipality which prohibited the grantee from selling or leasing to a private corporation the right to sell or sublet water or electric energy supplied by the facilities constructed on such land was held valid.[316]

Unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands, the Court restated the applicable principles governing Congress's power under this clause. It empowers Congress to act as both proprietor and legislature over the public domain; Congress has complete power to make those "needful rules" which in its discretion it determines are necessary. When Congress acts with respect to those lands covered by the clause, its legislation overrides conflicting state laws.[317] Absent action by Congress, however, states may in some instances exercise some jurisdiction over activities on federal lands.[318]

No state may tax public lands of the United States within its borders,[319] nor may state legislation interfere with the power of Congress under this clause or embarrass its exercise.[320] Thus, by virtue of a Treaty of 1868, according self-government to Navajos living on an Indian Reservation in Arizona, the tribal court, rather than the courts of that state, had jurisdiction over a suit for a debt owed by an Indian resident thereof to a non-Indian conducting a store on the reservation under federal license.[321] The question whether title to land that has once been the property of the United States has passed from it must be resolved by the laws of the United States; after title has passed, "that property, like all other property in the state, is subject to the state legislation; so far as that legislation is

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[313] Light v. United States, 220 U.S. 523 (1911). *See also The Yosemite Valley Case*, 82 U.S. (15 Wall.) 77 (1873).

[314] Camfield v. United States, 167 U.S. 518, 525 (1897). *See also* Jourdan v. Barrett, 45 U.S. (4 How.) 169 (1846); United States v. Waddell, 112 U.S. 76 (1884).

[315] United States v. McGowan, 302 U.S. 535 (1938).

[316] United States v. City of San Francisco, 310 U.S. 16 (1940).

[317] Kleppe v. New Mexico, 426 U.S. 529 (1976).

[318] California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).

[319] Van Brocklin v. Tennessee, 117 U.S. 151 (1886); *cf.* Wilson v. Cook, 327 U.S. 474 (1946).

[320] Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872). *See also* Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858); Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902).

[321] Williams v. Lee, 358 U.S. 217 (1959).

consistent with the admission that the title passed and vested according to the laws of the United States." [322] In construing a conveyance by the United States of land within a state, the settled and reasonable rule of construction of the state affords a guide in determining what impliedly passes to the grantee as an incident to land expressly granted.[323] But a state statute enacted subsequently to a federal grant cannot operate to vest in the state rights that either remained in the United States or passed to its grantee.[324]

Territories: Powers of Congress Thereover

In the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a state legislature might act.[325] It may legislate directly with respect to the local affairs of a territory or it may transfer that function to a legislature elected by the citizens thereof,[326] which will then be invested with all legislative power except as limited by the Constitution of the United States and acts of Congress.[327] In 1886, Congress prohibited the enactment by territorial legislatures of local or special laws on enumerated subjects.[328] The constitutional guarantees of private rights are applicable in territories which have been made a part of the United States by congressional action [329] but not in unincorporated territories.[330] Congress

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[322] Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 517 (1839).

[323] Oklahoma v. Texas, 258 U.S. 574, 595 (1922).

[324] United States v. Oregon, 295 U.S. 1, 28 (1935).

[325] Simms v. Simms, 175 U.S. 162, 168 (1899). *See also* United States v. McMillan, 165 U.S. 504, 510 (1897); El Paso & N.E. Ry. v. Gutierrez, 215 U.S. 87 (1909); First Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1880).

[326] Binns v. United States, 194 U.S. 486, 491 (1904). *See also* Sere v. Pitot, 10 U.S. (6 Cr.) 332, 336 (1810); Murphy v. Ramsey, 114 U.S. 15, 44 (1885).

[327] Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 604 (1897); Simms v. Simms, 175 U.S. 162, 163 (1899); Wagoner v. Evans, 170 U.S. 588, 591 (1898).

[328] 24 Stat. 170 (1886).

[329] Downes v. Bidwell, 182 U.S. 244, 271 (1901). *See also* Mormon Church v. United States, 136 U.S. 1, 14 (1890); ICC v. United States ex rel. Humboldt Steamship Co., 224 U.S. 474 (1912).

[330] Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922) (collectively, the *Insular Cases*). The guarantees of fundamental rights apply to persons in Puerto Rico, id. at 312–13, but what these are and how they are to be determined, in light of *Balzac's* holding that the right to a civil jury trial was not protected. The vitality of the *Insular Cases* has been questioned by some Justices (Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion); Torres v. Puerto Rico, 442 U.S. 465, 474, 475 (1979) (concurring opinion of four Justices)), but there is no doubt that the Court adheres to it (United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990); Harris v. Rosario, 446 U.S. 651 (1980)). Applying stateside rights in Puerto Rico are Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (procedural due process); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (equal protection principles); Torres v. Puerto Rico, 442 U.S. 465 (1979) (search and seizure); Harris v. Rosario, *supra* (same); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7–8 (1982) (equality of voting rights);

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may establish, or may authorize the territorial legislature to create, legislative courts whose jurisdiction is derived from statutes enacted pursuant to this section other than from Article III.[331] Such courts may exercise admiralty jurisdiction despite the fact that such jurisdiction may be exercised in the states only by constitutional courts.[332]

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

GUARANTEE OF REPUBLICAN FORM OF GOVERNMENT

The first clause of this section, in somewhat different language, was contained in the Virginia Plan introduced in the Convention and was obviously attributable to Madison.[333] Through the various permutations into its final form,[334] the object of the clause seems

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Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 331 n.1 (1986) (First Amendment speech). *See also* Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (right to travel assumed). Puerto Rico is, of course, not the only territory that is the subject of the doctrine of the *Insular Cases*. *E.g.*, Ocampo v. United States, 234 U.S. 91 (1914) (Philippines and Sixth Amendment jury trial); Hawaii v. Mankichi, 190 U.S. 197 (1903) (grand jury indictment and trial by jury).

[331] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). *See also* Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 447 (1872); Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 655 (1874); Reynolds v. United States, 98 U.S. 145, 154 (1879); *The "City of Panama,"* 101 U.S. 453, 460 (1880); McAllister v. United States, 141 U.S. 174, 180 (1891); United States v. McMillan, 165 U.S. 504, 510 (1897); Romeu v. Todd, 206 U.S. 358, 368 (1907).

[332] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828).

[333] "Resd. that a Republican government . . . ought to be guaranteed by the United States to each state." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (rev. ed. 1937). In a letter in April, 1787, to Randolph, who formally presented the Virginia Plan to the Convention, Madison had suggested that "an article ought to be inserted expressly guaranteeing the tranquility of the states against internal as well as external danger. . . . Unless the Union be organized efficiently on republican principles innovations of a much more objectionable form may be obtruded." 2 WRITINGS OF JAMES MADISON 336 (G. Hunt ed., 1900). On the background of the clause, *see* W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION ch. 1 (1972).

[334] Thus, on June 11, the language of the provision was on Madison's motion changed to: "Resolved that a republican constitution and its existing laws ought to be guaranteed to each state by the United States." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 193–194, 206 (rev. ed. 1937). Then, on July 18, Gouverneur Morris objected to this language on the ground that "[h]e should be very unwilling that such laws as exist in R. Island ought to be guaranteed to each State of the Union." 2 id. at 47. Madison then suggested language "that the Constitutional authority of the States shall be guaranteed to them respectively against domestic as

clearly to have been more than an authorization for the Federal Government to protect states against foreign invasion or internal insurrection,[335] a power seemingly already conferred in any case.[336] No one can now resurrect the full meaning of the clause and intent which moved the Framers to adopt it, but with the exception of the reliance for a brief period during Reconstruction the authority contained within the confines of the clause has been largely unexplored.[337]

In *Luther v. Borden*,[338] the Supreme Court established the doctrine that questions arising under this section are political, not judicial, in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character."[339] *Texas v. White*[340] held that the action of the President in setting up provisional governments at the conclusion of the war was justified, if at all, only as an exercise of his powers as Commander-in-Chief and that such governments were to be regarded merely as provisional regimes to perform the functions of government pending action by Congress. On the ground that the issues were not justiciable, the Court in the early part of this century refused to pass on a number of challenges to state governmental reforms and thus made the clause in effect noncognizable by the courts in any matter,[341] a status from which the Court's opinion in

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well as foreign violence," whereas Randolph wanted to add to this the language "and that no State be at liberty to form any other than a Republican Govt." Wilson then moved, "as a better expression of the idea," almost the present language of the section, which was adopted. Id. at 47–49.

[335] Thus, Randolph on June 11, supporting Madison's version pending then, said that "a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy." 1 id. at 206. Again, on July 18, when Wilson and Mason indicated their understanding that the object of the proposal was "merely" to protect states against violence, Randolph asserted: "The Resoln. has 2 Objects. 1. to secure Republican government. 2. to suppress domestic commotions. He urged the necessity of both these provisions." 2 id. at 47. Following speakers alluded to the dangers of monarchy being created peacefully as necessitating the provision. Id. at 48. *See* W. Wiecek, The Guarantee Clause of the U.S. Constitution ch. 2 (1972).

[336] *See* Article I, § 8, cl. 15.

[337] *See generally* W. Wiecek, The Guarantee Clause of the U.S. Constitution (1972).

[338] 48 U.S. (7 How.) 1 (1849).

[339] 48 U.S. at 42.

[340] 74 U.S. (7 Wall.) 700, 729 (1869). In Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1868), the state attempted to attack Reconstruction legislation on the premise that it already had a republican form of government and that Congress was thus not authorized to act. The Court viewed the congressional decision as determinative.

[341] Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912); Kiernan v. City of Portland, 223 U.S. 151 (1912); Davis v. Ohio, 241 U.S. 565 (1916); Ohio v. Akron Park Dist., 281 U.S. 74 (1930); O'Neill v. Leamer, 239 U.S. 244 (1915); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937). But in certain earlier cases the Court had disposed of Guarantee Clause questions on the merits. Forsyth v. City of Hammond, 166 U.S. 506 (1897); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

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Baker v. Carr,[342] despite its substantial curbing of the political question doctrine, did not release it.[343]

Similarly, in *Luther v. Borden*,[344] the Court indicated that it rested with Congress to determine the means proper to fulfill the guarantee of protection to the states against domestic violence. Chief Justice Taney declared that Congress might have placed it in the power of a court to decide when the contingency had happened that required the Federal Government to interfere, but that instead Congress had by the act of February 28, 1795,[345] authorized the President to call out the militia in case of insurrection against the government of any state. It followed, said Taney, that the President "must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress,"[346] which determination was not subject to review by the courts.

In recent years, the authority of the United States to use troops and other forces in the states has not generally been derived from this clause and it has been of little importance.

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[342] 369 U.S. 186, 218–32 (1962). In the Court's view, Guarantee Clause questions were nonjusticiable because resolution of them had been committed to Congress and not because they involved matters of state governmental structure.

[343] Subsequently, the Court, speaking through Justice O'Connor, raised without deciding the possibility that the Guarantee Clause is justiciable and is a constraint upon Congress's power to regulate the activities of the states. New York v. United States, 505 U.S. 144, 183–85 (1992); Gregory v. Ashcroft, 501 U.S. 452, 463 (1991). The opinions draw support from a powerful argument for using the Guarantee Clause as a judicially enforceable limit on federal power. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

[344] 48 U.S. (7 How.) 1 (1849).

[345] 1 Stat. 424.

[346] Luther v. Borden, 48 U.S. (7 How.) 1, 43 (1849).