Winter 1999

Common Law Preclusion, Full Faith and Credit, and Consent Judgments: The Analytical Challenge

Katherine C. Pearson
kcp4@psu.edu

Recommended Citation

Katherine C. Pearson, *Common Law Preclusion, Full Faith and Credit, and Consent Judgments: The Analytical Challenge*, 48 *Cath. U. L. Rev.* 419 (1999).

COMMON LAW PRECLUSION, FULL FAITH AND CREDIT, AND CONSENT JUDGMENTS: THE ANALYTICAL CHALLENGE

Katherine C. Pearson[*]

"A doctrine that a judgment is binding . . . does nothing to delineate its scope. There remains the question of what issues, and what persons, are concluded or bound."

-Professor Ronan E. Degnan.[1]

"[Y]ou're trying to make this applicable to Baker, and Baker is simply not bound."

-Justice Anthony M. Kennedy.[2]

I. INTRODUCTION

The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[3] The phrase "judicial proceedings" has become a term of legal art, meaning "final judgments."[4] The law regarding full faith and credit has developed largely in the context of litigated final judgments;[5]

---

[*]Assistant Professor of Law, The Dickinson School of Law of The Pennsylvania State University. I am grateful especially to Matthew J. Kloiber ('99) and Michelle M. Bassano ('99) for their excellent research assistance and to Dean Peter G. Glenn for his timely guidance and inspiration.

1. Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 756 (1976).

2. United States Supreme Court Official Transcript at 30, Baker v. General Motors Corp., 118 S. Ct. 657 (1998) (No. 96-653) [hereinafter Transcript], *available in* 1997 WL 638425 at *30; *see also id.* at 7-8 (Kennedy, J.) (declaring that the Bakers were not bound by the Michigan decree).

3. U.S. CONST. art. IV, sec. 1; *see* 28 U.S.C. § 1738 (1994) (requiring state and federal courts to give state judicial proceedings "the same full faith and credit" as those proceedings would be given in the jurisdiction where they occurred).

4. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 24.8, at 963 (2d ed. 1992) ("The Full Faith and Credit Clause refers to 'judicial proceedings' and, on its face, does not require 'finality' in a foreign decree as condition of enforcement. . . . However, it is generally assumed that recognition, in the interstate setting, is constitutionally required only for *final* decrees and judgments." (footnote ommitted)).

5. *See* Allen v. McCurry, 449 U.S. 90, 105 (1980) (applying rules of collateral estoppel that prevent relitigation of search and seizure issue resolved in state criminal case); Thomas v. Washington Gas Light Co., 448 U.S. 261, 286 (1980) (holding that full faith and credit did not bar additional workers' compensation award); Durfee v. Duke, 375 U.S. 106, 116 (1963) (holding that a judgment determining land ownership is entitled to full faith

most lawsuits, however, are resolved by settlements, and frequently these settlements involve documentation in the form of consent decrees or stipulated judgments. In reality, such judgments are often little more than the parties' contracts, rubber-stamped by the court.[6] How are such "consent judgments"[7] to be treated for purposes of full faith and credit when they impact on important interests of persons who are not parties to the settlement?

Recently, in *Baker v. General Motors Corp.*,[8] the Supreme Court was asked whether a consent judgment entered by a Michigan state court must be given full faith and credit by a federal court in Missouri. The order in question was written by the parties in 1992 as part of the settlement of a Michigan suit between General Motors ("GM") and Ronald Elwell ("Elwell"), its former employee. In the settlement, Elwell was paid money and he agreed to an order that prohibited him from testifying in future product liability cases against GM.[9] In 1994, the Bakers subpoenaed Elwell in their products liability suit in Missouri to testify

---

and credit, even as to the question of jurisdiction that had been fully litigated in the first proceeding in the matter); Fall v. Eastin, 215 U.S. 1, 14 (1909) (denying the transfer of title to land ordered by an out-of-state judgment because full faith and credit did not require enforcement); Fauntleroy v. Lum, 210 U.S. 230, 237-38 (1908) (holding that full faith and credit must be given to the judgment of another state notwithstanding any errors of law, and despite the fact that the underlying cause of action was prohibited in the second state). *But see* Yarborough v. Yarborough, 290 U.S. 202, 212-13 (1933) (holding that the first judgment, a consent decree arising out of the parties' settlement of their divorce, created a bar to child's second suit for support). Interestingly, *Yarborough* is as much known for Justice Stone's dissent, that would not have applied full faith and credit, as for the majority decision that did. *See id.* at 213-17 (Stone, J., dissenting).

6. A less disturbing, or more politically sensitive, description of the court's role is to refer to the entry of a consent judgment as a "'mere ministerial act.'" Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 54 (quoting 49 C.J.S., *Judgments* § 176, at 312 (1947)).

7. The phrase "consent judgments," will be used in this Article to refer to a wide variety of consensually created documents used by parties to settle their cases using a court order. *See* Fleming James, Jr., *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 178 (1959) (stating that "[c]onsent judgments are by no means all alike"); *see also* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4443, at 383 (1981) ("Consent judgments . . . may assume forms that range from simple orders of dismissal with or without prejudice to detailed decrees. Whatever form is taken, the central characteristic is that the court has not actually resolved the substance of the issues presented." (footnote ommitted)). Final judgments, arising from the court's action in adjudicating the case by summary judgment or trial, including those which order injunctive relief, will be referred to herein as "litigated judgments."

8. 118 S. Ct. 657 (1998).

9. The agreed order was phrased in terms of a "permanent injunction" that enjoined Elwell from "'testifying, without the prior written consent of General Motors Corporation . . . as an expert witness, or as a witness of any kind.'" *Id.* at 661 (quoting Order Dismissing Plaintiff's Complaint and Granting Permanent Injunction entered on August 26, 1992).

against GM, thus triggering questions about the effect of the Michigan order.[10] GM asserted that enforcement of the consent judgment was mandated by the Full Faith and Credit Clause and its statutory analogue,[11] thereby prohibiting any testimony by Elwell.

During appellate proceedings on the question of whether Missouri must recognize the Michigan order, the case attracted the attention of people outraged by the idea that GM might be able to "buy" the silence of a so-called whistleblower using the assistance of the court.[12] The case also drew the attention of people on both sides of the gay rights movement concerned with same-sex marriage issues, who hoped the Supreme Court would use this occasion to clarify whether public policy exceptions to full faith and credit would be recognized.[13] Adding further interest to

---

10. The effect of the Elwell consent judgment also was addressed in several other product liability claims against GM. *See, e.g.*, Hannah v. General Motors Corp., 969 F. Supp. 554, 560-61 (D. Ariz. 1996) (postponing ruling on full faith and credit issue to permit petitioner to seek modification of injunction); Ake v. General Motors Corp., 942 F. Supp. 869, 880-81 (W.D.N.Y. 1996) (refusing to enforce consent judgment because of public policy); Bishop v. General Motors Corp., No. 94-286-S, 1994 WL 910817, at *2 (E.D. Okla. 1994) (denying full faith and credit to injuction that violates state and federal policy of full discovery); Williams v. General Motors Corp., 147 F.R.D. 270, 273 (S.D. Ga. 1993) (denying enforcement of consent judgment because of public policy); Smith v. Superior Court, 49 Cal. Rptr. 2d 20, 21 (Cal. Ct. App. 1996) (refusing to enforce consent judgment because of California public policy); Ruskin v. General Motors Corp., No. CV 93 0073883, 1995 WL 41399, at *2 (Conn. Super. Ct. Jan. 25, 1995) (denying full faith and credit because blanket prohibition of testimony violates Connecticut public policy); Meenach v. General Motors Corp., 891 S.W.2d 398, 402-03 (Ky. 1995) (holding that the Kentucky Court may modify the injunction and allow Elwell to testify in the public interest of full discovery).

11. *See supra* note 3 and accompanying text.

12. *See* Brief of Amicus Curiae, The Association of Trial Lawyers of America, in Support of Petitioners at 9-10, Baker v. General Motors Corp., 118 S. Ct. 657 (1998) (No. 96-653), *available in* 1997 WL 280220 (arguing that preventing testimony of a knowledgeable witness undermines the judicial system of Missouri by preventing the state from conducting a full inquiry into a dangerous product); Brief of Amicus Curiae, Center for Auto Safety, in Support of Petitioners at 3-11, Baker v. General Motors Corp., 118 S.Ct. 657 (1998) (No. 96-653), *available in* 1997 WL 280222 (stressing the potential for wide-ranging effect of the decision on whistleblower evidence); *see also Smith*, 49 Cal. Rptr. 2d at 26 (finding that the Elwell/GM consent judgment equates to buying Elwell's silence and analogizing such a purchase to the felonious act of bribing a potential witness).

13. *See, e.g.*, David G. Savage, *Combustible Cases: Will a Car Crash Ruling Lead to Recognition of Gay Marriage?*, A.B.A. J. March 1998, at 42. *Compare* Brief of Amici Curiae, States of Ohio, Colorado, Utah and the Commonwealth of Virginia, in Support of Respondent at 3-6, Baker v. General Motors Corp., 118 S. Ct. 657 (1998) (No. 96-653), *available in* 1997 WL 414365 (arguing that full faith and credit requires other states to enforce the Michigan injunction regardless of whether the judgment is in conflict with the policies of the laws of the forum state, because permitting states to develop local exceptions would undermine the federal system of government), *with* Brief of Amici Curiae, States of Missouri, Connecticut, Iowa, Mississippi, Washington, Wisconsin and the Com-

the case, Harvard law professor and constitutional scholar, Laurence Tribe, handled the oral argument on behalf of the Bakers.[14] Professor Tribe urged the Court to deny enforcement of the Michigan consent decree on the basis of due process, an important argument that was nonetheless avoided by the Court,[15] even as it ruled in favor of the Bakers.

In the decision of *Baker v. General Motors*, Justice Ruth Bader Ginsburg, writing for the majority of the justices, sought to reaffirm the importance of full faith and credit jurisprudence mandating interjurisdictional enforcement of final judgments and to confirm that injunctive relief is included within the scope of this constitutional principle.[16] Nonetheless, she refused to require the Missouri federal court to enforce the Michigan judgment, a position on which the Supreme Court was unanimous.[17] The decision articulated an unexpected rationale[18] by which the Missouri court was justified in refusing to honor the Michigan court's final order. The court said the following:

> A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. . . .

---

monwealth of Massachusetts, in Support of Petitioners at 1-3, Baker v. General Motors Corp., 118 S. Ct. 657 (1998) (No. 96-653), *available in* 1997 WL 280223 (arguing that the principles of federalism enshrined in full faith and credit "do not override fundamental due process" and that the Bakers, as absent parties to the Elwell dispute, may not be precluded from obtaining "every man's testimony" as required by Missouri public policy).

14. Also indicating the high stakes involved, GM was represented in oral argument before the Eighth Circuit by former federal circuit court judge, Kenneth W. Starr, at a time when his attentions were not yet fully engaged by his role as independent counsel investigating President Clinton. "Starr, who earned more than $1.1 million in private legal work last year [1996] even while serving as independent counsel, has decided not to argue the case [before the Supreme Court] himself because of his workload, according to [Kirkland & Ellis] law firm partner Paul Cappuccio, who will argue instead." Tony Mauro, *GM's "Whistle-Blower" Case*, USA TODAY, Oct. 6, 1997, at 14A.

15. *See* discussion *infra* Part V (focusing on the implications of *Baker* and the Court's avoidance of the due process issue).

16. *See* Baker v. General Motors Corp., 118 S. Ct. 657, 663-65 (1998) ("The Court has never placed equity decrees outside the full faith and credit domain. . . . We see no reason why the preclusive effects of an adjudication . . . should differ depending solely upon the type of relief sought in a civil action.").

17. Justice Ginsburg's opinion was joined by Chief Justice Rehnquist and Justices Stevens, Souter, and Breyer. Justice Scalia wrote a short opinion concurring in the judgment. *See id.* at 668. Justice Kennedy wrote an opinion concurring in the judgment, which is critical of the analysis used by Ginsburg. His concurrence was joined by Justices O'Connor and Thomas. *See id.*

18. *See id.* at 669 (Kennedy, J., concurring) ("The exceptions the majority recognizes are neither consistent with its rejection of a public policy exception to full faith and credit nor in accord with established rules implementing the Full Faith and Credit Clause.").

> Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law. . . .
>
> Michigan's judgment . . . cannot reach beyond the Elwell-GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered.[19]

The Court's decision identifies limitations on "the authority of one State's court to order that a witness' testimony shall not be heard in any court of the United States."[20] As such, the decision applies to both litigated and consent judgments, and can be viewed as recognizing an important exception to the often lauded importance of the Full Faith and Credit Clause as a mandate for interjurisdictional finality of judgments.[21] Despite Justice Ginsburg's strongly asserted rejection of public policy as a basis for avoiding the full faith and credit command,[22] the decision itself appears to coincide with the theory expressed in section 103, a controversial public policy-based exception, described in the *Restatement (Second) of Conflict of Laws*.[23]

In an era of complex public interest suits, often involving class actions and covering the spectrum from individual civil rights to global environmental issues, the *Baker* decision potentially impacts the daily work of litigators *and* scholars. Consent judgments,[24] properly drawn, have

---

19. *Id.* at 663-66.

20. *Id.* at 660.

21. Justice Kennedy criticized this aspect of the decision. *See id.* at 669 (Kennedy, J., concurring) ("As employed to resolve this case, furthermore, the exceptions [recognized by the majority] to full faith and credit have a potential for disrupting judgments, and this ought to give us considerable pause.").

22. *See id.* at 664, 667 (arguing that case law does not support a public policy exception).

23. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1969) [hereinafter RESTATEMENT (SECOND) OF CONFLICTS] (setting forth the proposition that "[a] judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State").

24. There is no single definition for "consent judgments," nor is there universal understanding of what is meant by the similar terms "stipulated judgments," "consent decrees," or "joint final orders." The common factors are the agreement of the parties and some measure of "approval" by the court. *See* Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103 ("A consent decree is simply a settlement that includes an injunction."). Some states have

proven to be useful tools in the management of such multi-party and multi-jurisdictional litigation, and both "liberal" and "conservative" interests have something to gain—or lose—from broad enforcement of such decrees.[25] When crafting consent judgments, practicing lawyers will need to understand the third party effects of such agreements. Similarly for scholars, the decision provides additional insight into the jurisprudence of a conservative Supreme Court that seems willing to set limits on one court's ability to control proceedings in another jurisdiction, but is reluctant to do so on any basis that implies "new" individual rights.[26] And, as will be demonstrated in this Article, for both practitioners and theorists, the decision in *Baker* is as important for what it does *not* say as for what it does say about third party concerns in consent judgments.

The Article begins with an overview of the *Baker* case,[27] including a discussion of facts and issues not directly addressed by the Supreme Court, but that are important to an understanding of its ruling.[28] The Article then identifies key analytical approaches that were articulated during the protracted course of *Baker v. General Motors*.[29] Following a brief review of basic principles of preclusion[30] and a note of caution about their application to consent judgments,[31] this Article undertakes examination

---

adopted rules governing consent judgments, such as CAL. CIV. PROC. CODE § 664.6 (West 1987 & Supp. 1998) (governing the entry of judgment by agreement). Some other areas of the law have created a specific role for the court in "approving" a settlement or responding to a challenge, as in FED. R. CIV. P. 23(e) (stating that "[a] class action shall not be . . . compromised without the approval of the court") and 42 U.S.C.A. § 2000e-2(n) (1994 & West Supp. 1998) (governing challenges to employment practices set by consent judgments). However, this Article is concerned primarily with the largely undefined and unregulated practice of asking the court to sign a final order, the terms of which were dictated by the parties.

25. *Compare* Martin v. Wilks, 490 U.S. 755, 768-69 (1989) (refusing to treat a consent decree settling black firefighters' employment suit as a bar to white firefighters' claims regarding unfair treatment), *with* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996) (permitting a consent decree to resolve shareholder claims beyond the scope of the state court's specific jurisdiction, and despite objections raised by federal case class members).

26. *See* discussion *infra* Part V.C (focusing on the fact that the Court "side-stepped" the due process issue argued by Professor Tribe).

27. *See* discussion *infra* Part II (analyzing the background of *Baker*).

28. *See* discussion *infra* Part II.A (discussing specifically the background of Ronald Elwell's consent judgment in Michigan).

29. *See* discussion *infra* Part II.B (focusing specifically on the history of the Bakers' case).

30. *See* discussion *infra* Part III.A & B (discussing interjurisdictional principles, specifically, the common law rule of preclusion).

31. *See* discussion *infra* Part III.C (warning that interjurisdictional preclusion principles applied to consent judgments may give rise to specific fairness concerns).

of Justice Ginsburg's important majority decision.[32] The concluding sections of this Article analyze the reasons for her departure from the major theories advanced by the parties and the implications of *Baker* for future questions of interjurisdictional enforcement of judgments, whether litigated or consensual.[33] In closing, this Article suggests the need for a clearer statement of the law governing—or limiting—preclusion by consent judgments.[34]

II. BACKGROUND

An analysis of a "full faith and credit" enforcement issue requires an understanding of common law preclusion principles. In order to respond to the major holdings in *Baker*, it is helpful to review certain basic legal principles;[35] however, to put these principles into context, this Article first will explore the factual and legal setting of *Baker*.

A. The Michigan Consent Judgment

Ronald Elwell began his employment with GM in 1959. In 1971, he was assigned to an engineering analytical team, and his particular work focused on fuel systems and fuel-fed fires. In this capacity he suggested changes in GM fuel line designs and conducted analyses of GM vehicle fires.[36] As part of his work, he consulted with GM legal staff and outside counsel who were preparing defenses for product liability suits.[37] On behalf of GM, he testified both as a factual witness and as an expert witness, and assisted in preparation for litigation, including answering discovery requests. GM identified Elwell on multiple occasions as its expert witness on fuel systems in response to discovery under Federal Rule of Civil Procedure 30(b)(6).[38] Despite his long-term role as a company man, his relationship with GM deteriorated, eventually to the point where both parties were dissatisfied.

In 1991, Elwell filed suit against GM in Michigan state court, alleging

---

32. *See* discussion *infra* Part IV (focusing on Justice Ginsburg's majority opinion).

33. *See* discussion *infra* Part V.A–C (discussing the implications of Justice Ginsburg's and Justice Kennedy's opinions).

34. *See* discussion *infra* Part VI (concluding that limitations exist on interjuridictional effects of judgments).

35. *See* discussion *infra* Part III (describing the basic interjurisdictional preclusion principles).

36. *See* Baker v. General Motors Corp., 118 S. Ct. 657, 660-61 (1998); *see* Brief for Petitioners at 4, Baker v. General Motors Corp., 118 S. Ct. 657 (1998) (No. 96-653) [hereinafter Petitioner's Brief], *available in* 1997 WL 278921.

37. *See Baker*, 118 S. Ct. at 661; Petitioner's Brief, *supra* note 36, at 4.

38. *See* Petitioner's Brief, *supra* note 36, at 4-5.

wrongful discharge and other tort and contract claims; GM counterclaimed, alleging breach of fiduciary duty arising from alleged disclosure of privileged and confidential information and misappropriation of proprietary documents.[39] Upon motion by GM, the Michigan court held a hearing and issued a preliminary injunction, enjoining Elwell from "consulting or discussing with or disclosing to any person any of General Motors Corporation's trade secrets[,] confidential information or matters of attorney-client work product relating in any manner to the subject matter of any products liability litigation whether already filed or [ ] filed in the future."[40] However, the court denied GM's request that Elwell be barred from giving *any* testimony whatsoever about GM products.[41]

Elwell and GM eventually entered into a settlement of all claims in August 1992, with Elwell accepting an undisclosed sum of money. As part of the settlement, three documents were created. One document was an agreed or stipulated "permanent injunction" that prohibited Elwell from giving virtually any testimony in litigation involving GM.[42] The Michigan state court signed this stipulated final injunction without making any changes.[43] "A judge new to the case, not the judge who conducted a hearing at the preliminary injunction stage, presided at the settlement stage and entered the permanent injunction."[44] This document is the consent judgment under consideration in the *Baker* case and in other product liability claims against GM.

The second document created by the settlement consisted of a series of

---

39. *See Baker*, 118 S. Ct. at 661; Petitioner's Brief, *supra* note 36, at 5.

40. *Baker*, 118 S. Ct. at 661 (citation omitted); Petitioner's Brief, *supra* note 36, at 5-6.

41. *See Baker*, 118 S. Ct. at 661; Petitioner's Brief, *supra* note 36, at 6.

42. *See Baker*, 118 S. Ct. at 661; Petitioner's Brief, *supra* note 36, at 6. The injunction specifically prohibited Elwell from

> (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment with General Motors Corporation; and (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial as an expert witness, or a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of the Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

Petitioner's Brief, *supra* note 36, at 6.

43. *See Baker*, 118 S. Ct. at 661 ("On August 26, 1992, with no further hearing, the Michigan court entered the injunction precisely as tendered by the parties.").

44. *Id.* at 661 n.1.

"stipulations" signed by Elwell and a representative of GM. The stipulations provided, among other things, that "[b]ecause of [Elwell's past] working relationship with GM's Legal Staff and outside counsel, depending on the subject matter, it is extremely difficult for Elwell to determine whether his knowledge with respect to GM only comes from attorney-client and work product communications or from non-privileged communications."[45] These stipulations were made part of the record in the Michigan court, and appeared to be GM's explanation for a complete ban on Elwell's testimony. The stipulations did not, however, require any judicial approval.[46]

By the third document, a separate "settlement agreement," the parties further agreed that Elwell could testify if ordered to do so by a court or other tribunal: "'[Elwell's] appearance and testimony . . . if the Court or other tribunal so orders, will in no way form a basis for an action in violation of the Permanent Injunction or this Agreement.'"[47] According to the parties, the full terms of this settlement agreement are unavailable to the public because this document was "sealed" by the Michigan court, although it is unclear from the record upon what basis the sealing was necessary.[48]

Before the settlement, Elwell had already testified at a deposition in the Georgia action specifically referred to in the injunction, regarding what he contended was an inferior fuel system in a GM pickup; the same fuel system he had defended in other cases. The settlement agreement expressly permitted Elwell to testify in the Georgia trial.[49] However, be-

45. *See* Stipulation, Elwell v. General Motors Corp., No. 91-15946 (Mich. Cir. Ct., Apr. 16, 1993) [hereinafter Stipulations], *reprinted in* Joint Appendix at 13, Baker v. General Motors Corp., 118 S. Ct. 657 (1998).

46. In its briefing to the Supreme Court, GM claimed that as part of the settlement, GM and Elwell agreed to factual stipulations, including Elwell's specific acknowledgment "that his close working relationship with General Motors' lawyers permeates everything he learned during his employment," thus establishing that it was virtually impossible for him to testify without violation of some privilege. Brief for Respondent at 5, Baker v. General Motors Corp., 118 S. Ct. 657 (1998) (No. 96-653) [hereinafter Respondent's Brief], *available in* 1997 WL 413160.

47. *Baker*, 118 S. Ct. at 662 (quoting Settlement Agreement).

48. *See* Brief of Appellees, Petition for Rehearing En Banc at 1 n.1, Baker v. General Motors Corp., 86 F.3d 811 (8th Cir. 1996). As was observed by former United States District Court Judge Prentice H. Marshall (N.D. Ill. 1973-96), based on his experience with so-called protective orders stipulated by parties, "[i]f litigants want their disputes resolved by the judiciary, the resolution should be done publicly." Prentice H. Marshall, *Letter to the Editor*, A.B.A. J., June 1998, at 10.

49. *See Baker*, 118 S. Ct. at 661. In the products liability case referred to in the Elwell/GM settlement, *Moseley v. General Motors Corp.*, 447 S.E.2d 302, 305 (Ga. Ct. App. 1994), *abrogated by* Webster v. Boyett, 496 S.E.2d 459 (Ga. 1998), the jury, following sanc-

tween 1992 and 1997, Elwell was subpoenaed to testify in numerous additional cases against GM across the country, resulting in varying rulings on the effect of the Michigan consent judgment.[50]

B. The Lower Courts' Rulings

The Bakers' case, filed in 1991, was a wrongful death suit arising out of the death of Beverly Garner, a 29-year-old passenger in a 1985 Chevrolet S-10 Blazer, in a 1990 highway accident.[51] The Bakers alleged that the Blazer's electric fuel pump was faulty, with no adequate mechanism to prevent gas from entering the engine compartment when a collision occurs, contributing to a fire that killed their mother and the driver of the vehicle.[52] The suit was filed in Missouri state court and was removed by GM to the federal district court in Missouri on the basis of diversity.[53] GM denied the allegations of product fault and alleged that impact-injuries from the collision caused by the other driver's negligence were the cause of Garner's death.[54] The Bakers sought to depose Elwell, which GM opposed on the basis of the Michigan injunction. In an unpublished order, the federal district court ruled that public policy prevented enforcement of the consent judgment.[55] The district court noted that Missouri's public policy was embodied in the Missouri Rules of Civil Procedure and favored full disclosure of all non-privileged, relevant information.[56]

---

tions for discovery abuses entered against GM, awarded $4.24 million in compensatory damages and $101 million in punitive damages. The verdict was appealed and the Georgia Court of Appeals reversed the judgment because of improperly admitted evidence of other accidents. *See id.* at 313. The Moseley suit was settled, along with three other GM product suits, in September 1995 for a "confidential" sum. Jim Cahoy, *GM Settles Pickup-Truck Lawsuits After Judge Bars Defense Exhibits from Trial*, WEST'S LEGAL NEWS, Sept. 13, 1995, *available in* 1995 WL 909466.

50. *See supra* note 10 (citing cases addressing the interpretation of the Elwell/GM consent judgment in other product liability claims against GM).

51. *See Baker*, 118 S. Ct. at 662; Petitioner's Brief, *supra* note 36, at 2; Respondent's Brief, *supra* note 46, at 2.

52. *See Baker*, 118 S. Ct. at 662; Respondent's Brief, *supra* note 46, at 2-3.

53. *See Baker*, 118 S. Ct. at 662; Petitioner's Brief, *supra* note 36, at 3; Respondent's Brief, *supra* note 46, at 2.

54. *See Baker*, 118 S. Ct. at 662; Respondent's Brief, *supra* note 46, at 3.

55. *See Baker*, 118 S. Ct. at 662. The district court held, "Michigan's injunction need not be enforced because blocking Elwell's testimony would violate Missouri's 'public policy,' which shielded from disclosure only privileged or otherwise confidential information." *Id.*

56. *See* Baker v. General Motors Corp., 86 F.3d 811, 819 (8th Cir. 1996), *rev'd*, 118 S. Ct. 657 (1998) (discussing the district court opinion). The Michigan order, which did not differentiate between privileged and non-privileged information, was characterized as inconsistent with Missouri public policy. *See id.*

In a separate ruling, the district court also imposed significant sanctions against GM for failing to disclose information during discovery, ordered that GM's affirmative defenses be stricken, and further instructed the jury that the fuel pump in question "was defective" and that "General Motors ha[d] been aware of this defect and hazard for many years."[57] These rulings, combined with Elwell's testimony that the defect contributed to the fire in question, undoubtedly affected the jury's finding of causation and award of $11.3 million in damages.

The Eighth Circuit reversed the district court's judgment,[58] in pertinent part finding that the injunction of the Michigan court was entitled to full faith and credit, thus preventing Elwell from testifying in the federal proceedings.

> Assuming, *arguendo*, that a public policy exception to the full faith and credit command exists, we conclude that the district court improperly relied on such an exception in this case because of Missouri's equally strong public policy in favor of full faith and credit. . . . Consequently, the district court incorrectly used Missouri's interest in full and fair discovery to override its interest in giving full faith and credit to a sister state's judgment.[59]

Further, the Eighth Circuit rejected the district court's position that it had the power to modify the injunction.[60]

The Bakers sought rehearing *en banc* on an issue not expressly reached by the panel, arguing that Michigan case law does not give preclusive effect to consent judgments or to injunctions affecting nonparties, thereby eliminating any full faith and credit issue.[61] The Bakers' rehearing requests were denied, and the case was remanded for reconsideration of

---

57. Baker v. General Motors Corp., 159 F.R.D. 519, 528 (W.D. Mo. 1994), *rev'd*, 86 F.3d 811 (8th Cir. 1996).

58. On the other issues raised by GM on appeal, the Eighth Circuit affirmed the need for discovery sanctions against GM for its willful violation of discovery orders, but held that the heavy sanctions imposed at the outset of trial were an abuse of discretion, improperly depriving the manufacturer of its day in court. *See Baker*, 86 F.3d at 816-17. Further, the award of $11.3 million in damages, unapportioned between compensatory and punitive damages, occurred without jury instructions necessary to define and properly restrict the jury's discretion, thus violating due process. *See id.* at 817-18. These rulings were not the subject of further appeals; therefore, on remand from the Supreme Court, determination of new, appropriate sanctions and a trial on all issues would be necessary. *See* Baker v. General Motors Corp., 138 F.3d 1225, 1225-26 (8th Cir. 1998).

59. *Baker*, 86 F.3d at 819 (footnote omitted).

60. *See id.* (stating that "the mere fact that an injunction remains subject to modification in one state does not render it unworthy of full faith and credit in another").

61. *See* Brief of Appellees, Petition for Rehearing En Banc at vi, Baker v. General Motors Corp., 86 F.3d 811 (8th Cir. 1996) (No. 95-1604).

appropriate sanctions against GM and for a new trial, without Elwell's testimony.[62]

C. The Parties' Contentions Before the Supreme Court

The Bakers' petition for a writ of certiorari focused on the need for clarification about the reach of the full faith and credit principle as to nonparties and for resolution of conflicting decisions of various courts that had faced the question of enforcing the Michigan consent decree regarding Elwell's testimony in other product liability cases against GM. Specifically, the Bakers initiated a two-pronged attack. Their primary argument urged the Court to find the Full Faith and Credit Clause inapplicable because the Due Process Clause prevents a court from issuing an order binding nonparties to its ruling. The Bakers' secondary argument was a more generalized appeal to "institutional and systemic" integrity considerations.[63]

In their primary position, the Bakers urged the Court to recognize the implications of its previous decisions in *Martin v. Wilks*[64] and *Matsushita Electric Industrial Co. v. Epstein*,[65] and traced the history of due process, as a guarantee of adequate notice and an opportunity to be heard, back to the Court's rulings in personal jurisdiction cases.[66] They contended that enforcement of the Michigan injunction agreed to in the Elwell/GM suit would "impair the right of petitioners and others similarly situated to full acquisition of evidence necessary to prosecute their claims against

62. *See Baker*, 86 F.3d at 811 (denying rehearing en banc); *see also* Petitioner's Brief, *supra* note 36, at 10.

63. *See* Petitioner's Brief, *supra* note 36, at 18 (maintaining that "even if the Full Faith and Credit obligation were somehow triggered here, it would have to yield to overriding principles of law: to institutional and systemic interests in the integrity of judicial proceedings").

64. 490 U.S. 755, 761 (1989) (rejecting the "impermissible collateral attack" doctrine asserted as bar to white firefighters seeking relief from effects of consent decree settling black firefighters' civil rights suit).

65. 516 U.S. 367, 373-75 (1996) (holding that a federal court may not withhold full faith and credit from a state court judgment approving a class action settlement simply because the settlement-released claims were within the exclusive jurisdiction of federal courts).

66. *See* Petitioner's Brief, *supra* note 36, at 13-14 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945); *Pennoyer v. Neff*, 95 U.S. 714, 727, 732 (1878); RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, § 104 (referencing the principle that "'[a] judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states'").

GM without any possible legal redress."[67]

The Bakers' second argument identified scenarios in which it was appropriate for the Supreme Court to decline to enforce a prior court's order so as to preserve the public's "right to every man's evidence."[68] However, the Bakers specifically avoided characterizing this argument as being based on public policy,[69] despite the ruling of the trial court and the decisions of several other lower courts that declined to enforce the Elwell/GM judgment on the grounds of public policy.[70]

In their brief-in-chief, the Bakers did not ask the Court to consider a traditional approach to full faith and credit issues—one which begins with a determination of the extent to which the law of the rendering state, in this case, Michigan, would mandate enforcement of its own order in these circumstances.[71] In their reply brief, however, responding to what they believed was GM's mischaracterization of Michigan law,[72] the Bakers argued that Michigan case law declined full preclusive effect in two relevant areas: consent judgments[73] and judgments, litigated or otherwise, that attempt to bind nonparties.[74] This last place positioning of the state law argument was apparently the result of a tactical decision when petitioning for certiorari; by limiting their petition, and therefore their issues for initial briefing, to a clear constitutional argument that juxtaposed full faith and credit with due process concerns, the Bakers' strengthened their chances of obtaining Supreme Court review. Their argument also was made more compelling by the existence of a conflict among the states over interpretation of the Michigan state court order.[75]

---

67. Petitioner's Brief, *supra* note 36, at 17.

68. *See id.* at 18-19.

69. *See id.* at 18 n.8, 24 n.16.

70. *See supra* note 10 (citing cases addressing the interpretation of the Elwell/GM consent judgment in other product liability claims against GM).

71. *See infra* notes 133-38, 235-44 and accompanying text (analyzing the preclusive effect of a consent judgment).

72. *See* Reply Brief for Petitioners at 19, Baker v. General Motors Corp., 118 S. Ct. 657 (1998) (No. 96-653) [hereinafter Petitioner's Reply Brief], *available in* 1997 WL 471824 ("Our argument in no way depends on the status of the injunction under Michigan law. However, GM's position is untenable . . . .").

73. *See id.*

74. *See id.*

75. *See generally* Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, LITIG., Spring 1998, at 25.

> [In recent Terms] the Court has tightened up its own centralized mechanism for quickly disposing of almost seven thousand annual requests for review. . . . In this period of contraction, even seasoned Court watchers hesitate to predict which cases will make the cut. The problem is particularly acute for private litigants. . . . [The Court] grants only 3 percent of private paid petitions."

The responsive arguments made by GM rested on traditional, if boldly stated, principles of jurisprudence about full faith and credit. GM contended that full faith and credit mandates respect for final orders, even orders granting mandatory equitable relief: "[i]n light of the clear constitutional text, this Court has never refused to apply the Clause in cases that arise in equity."[76] The company warned that any attempt to avoid enforcement of the Michigan state order would create a public policy exception that would undermine the essential character of the full faith and credit principle.[77] "It has long been settled that there is no 'public policy' exception to the command of full faith and credit for judgments,"[78] argued GM, citing cases[79] and scholarship[80] that characterize the Full Faith and Credit Clause and its statutory extension as creating a virtual "iron rule" of enforcement from jurisdiction to jurisdiction. Furthermore, GM argued that enforcement was not being sought against the Bakers, but only against Elwell, and that the Bakers merely were affected in an incidental manner that did not justify a due process analysis.[81] Adopting a due process inquiry "would expand *Wilks* beyond all recognizable bounds and effectively abandon any limits on the type of interests af-

---

Id. An argument that the Eighth Circuit erred in failing to apply Michigan preclusion law, while "certworthy," may have proven to be unattractive. *See id.* at 27 ("On very rare occasions the Court grants certiorari to supervise a federal appellate court's application of state law on the theory that the lower court has fundamentally misperceived the requirements of the *Erie* doctrine. But this happens only once or twice in a decade.").

76. Respondent's Brief, *supra* note 46, at 18. *But see* RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, § 102 ("A valid judgment that orders the doing of an act other than the payment of money, or that enjoins the doing of an act, *may* be enforced . . . in other states." (emphasis added)).

77. *See* Respondent's Brief, *supra* note 46, at 23.

78. *Id.* at 12.

79. *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230, 237 (1908), *cited in* Respondent's Brief, *supra* note 46, at 12, 20 and 24 n.14 (finding that a judgment by a state court should have the same effect in every other court in the United States).

80. *See* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 412 (1994), *cited in* Respondent's Brief, *supra* note 46, at 25, n.15) (arguing that the requirement to give full faith and credit to a sister state's final judgment "is so clear and strong that it might be called the 'Iron Law' of Full Faith and Credit").

81. *See* Respondent's Brief, *supra* note 46, at 35. GM argued the due process claims were flawed for the "simple reason that [the Bakers did] not have any sufficiently substantial 'liberty' or 'property' interest in obtaining the testimony of a single witness . . . to trigger formal due process protection even if affording the injunction full faith and credit [meant] foreclosing their hope to have Elwell testify." *Id.* (citing the due process test of *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972) as support of this proposition). GM argued that unlike the plaintiffs in *Martin v. Wilks*, 490 U.S. 755 (1989), the Bakers were not being deprived of their cause of action, but only of the non-unique testimony of one witness. *See* Respondent's Brief, *supra* note 46, at 35-36.

forded due process protections."[82] In making these arguments, GM downplayed the settlement that dictated the final order, implying the final order was based on findings made when the court issued a preliminary injunction, following a "full[y] adversarial" hearing.[83]

General Motors opened the door to analysis of the underlying Michigan law by arguing that Michigan law regarding collateral attacks on injunctive relief would require third parties to return to the issuing court to seek modification or vacation of the injunction, a prerequisite the Bakers had failed to satisfy.[84] GM contended that "[a]ffording the injunction the *same respect* that it would receive in the courts of the rendering State simply requires petitioners to raise their claims for access to Elwell's testimony—which necessarily require altering the injunction—in the Michigan court that issued the original decree."[85] Finally, GM's brief asserted that the Supreme Court has "squarely held that . . . a consent decree is entitled to full faith and credit."[86]

III. THE BASICS: INTERJURISDICTIONAL PRECLUSION PRINCIPLES

The multiple theories urged during the course of *Baker v. General Motors Corp.* demonstrate how complex the jurisprudence of full faith and credit can become. For purposes of discussing the interjurisdictional preclusion theories relied on by the parties or utilized by the courts, certain abbreviations and terms adopted by commentators on conflicts law[87] will be used here: "F-1" refers to the first court that "renders" the judg-

82. Respondent's Brief, *supra* note 46, at 39.

83. *See id.* at 4-5.

84. *See* Respondent's Brief, *supra* note 46, at 42-43. GM argued that under the applicable rule, a "'judgment or order' may be set aside or vacated 'only by the judge who entered the judgment or order, unless that judge is absent or unable to act.'" *Id.* at 42 (quoting MICH. CT. R. 2.613(B); *see* Huber v. Frankenmuth Mut. Ins. Co., 408 N.W.2d 505, 508 (Mich. Ct. App. 1987) (applying the rule); Berar Enters., Inc. v. Harmon, 300 N.W.2d 519, 523-25 (Mich. Ct. App. 1980) (rejecting a collateral attack because it did not comply with Rule 2.613(B)).

85. Respondent's Brief, *supra* note 46, at 13. GM's "return" argument was rejected by the Supreme Court because the Full Faith and Credit Clause could not be used to require the Bakers to submit to Michigan's jurisdiction. *See* Baker v. General Motors, Corp., 118 S. Ct. 657, 672 (1998).

86. Respondent's Brief, *supra* note 46, at 28 (citing Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996)). For the proposition that a consent judgment is a "judicial act and possesses the same force and character as a judgment rendered following a contested trial or motion," see the Michigan case, *Trendall v. Solomon*, 443 N.W.2d 509, 511 (Mich. Ct. Ap. 1989).

87. *See, e.g.*, Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 947-48 (1998) (incorporating the use of symbols in interjurisdictional preclusion analysis).

ment at issue while "F-2" will be used for any jurisdiction/court in which "recognition" is sought. In addition, the Bakers and other plaintiffs in product liability suits who were similarly affected by the Elwell/GM order will be described as "nonparties" or "third parties," referring to their status in F-1. To facilitate understanding of the *Baker* decision, it is helpful to organize the major theories into separate analytical approaches:

1. *F-2's Public Policy Approach*: Accepting the principle that full faith and credit applies to the judgment in question, the F-2 court should refuse to enforce the F-1 judgment when there is a strong, overriding public policy interest recognized by the F-2 jurisdiction. This approach was adopted by the Missouri federal district court, and several other trial courts, in responding to the perceived unfairness of being asked to enforce the Michigan consent judgment in products liability suits asserted against GM.[88] This use of public policy to avoid full faith and credit was addressed specifically by Justice Ginsburg in the majority opinion.[89]

2. *Iron Rule Approach*: Accepting the principle that full faith and credit applies, the court should follow the "iron rule," rejecting the existence of public policy exceptions generally or, alternatively, rejecting assertions of a weak F-2 public policy. Any effect on nonparties in this instance is merely an incidental, although unfortunate, consequence of the proper application of full faith and credit. This argument was made by GM and, in large part, was accepted by the Eighth Circuit.[90] Important limitations on this approach are implied by the Supreme Court's decision.[91]

3. *Due Process Analytical Approach*: F-1's judgment, when applied to nonparties, violates the due process rights of such persons to notice and an opportunity to be heard on the issues, and therefore due process should be recognized as a specific limitation on full faith and credit.[92] This argument was the central one made by the Bakers in their initial briefs, but for reasons discussed herein at Part V.C, it was not addressed by the Supreme Court in its decision.

4. *Institutional/Systemic Integrity Approach*: Despite the full faith and credit command, the Supreme Court always has recognized instances

88. *See Baker*, 118 S. Ct. at 664; *see also supra* note 10 (discussing cases in which the court refused to enforce a consent judgment on the basis of public policy).

89. *See Baker*, 118 S. Ct. at 664; *see infra* Part V.A (examining public policy exceptions to full faith and credit).

90. *See* Baker v. General Motors Corp., 86 F.3d 811, 819-20 (8th Cir. 1996), *rev'd*, 118 S. Ct. 657 (1998); *see also* Respondent's Brief, *supra* note 46, at 39.

91. *See infra* Parts IV, V (analyzing the Supreme Court's approach to the full faith and credit requirements for third parties).

92. *See* Petitioner's Brief, *supra* note 36, at 12-18.

where enforcement of F-1's order will not be required in F-2 courts; the Supreme Court should recognize that an attempt by F-1 to determine the admissibility of evidence in F-2 is another such instance. This approach, argued by the Bakers as a secondary position in their brief,[93] and despite a certain vagueness in precedent, comes the closest to Justice Ginsburg's eventual ruling.[94]

5. *First Step Approach, Looking to F-1's Preclusion Law*: The analysis of a full faith and credit enforcement question should begin with the "first step" of determining the effect that the judgment would have under the F-1 court's preclusion law. If the F-1 jurisdiction would not enforce the judgment under these circumstances, the full faith and credit command should have no application.[95] This argument was an alternative raised by the Bakers in briefing before the Eighth Circuit, and in responsive briefing before the Supreme Court. As will be discussed in greater detail below at Part V.B, this argument became the major focus of Justice Kennedy in his concurring opinion.

6. *Waiver Approach, Holding that Only F-1 Has Authority to Modify Injunction*: GM took the position that any relief from an F-1 injunction must be obtained from the F-1 court that issued the order. In essence, GM argued that the Bakers were bound by the Michigan judgment because of their failure to attempt to seek any appropriate relief from the rendering court. This argument seems disingenuous at best and, at worst, actually heightens the jurisdictional or due process concerns about GM's attempt to affect the claims of persons who were never present in Michigan.[96] Although the law generally recognizes that the issuing court has authority to enforce or modify injunctive relief,[97] it seems likely that any attempt by the Bakers or similar claimants to seek relief in Michigan would have been met by the traditional consent judgment argument that the F-1 court does not have the power to modify a consent judgment in

93. *See id.* at 18-29.

94. *See infra* Part IV (analyzing Justice Ginsburg's Majority Opinion in *Baker v. General Motors Corp.*, 118 S. Ct. 657 (1998)).

95. *See* Baker v. General Motors Corp., 118 S. Ct. 657, 671 (1998) (Kennedy, J., concurring).

96. *See, e.g.*, FED. R. CIV. P. 65(d) ("Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.").

97. *See* Opal Lake Ass'n. v. Michaywe' Ltd. Partnership, 209 N.W.2d 478, 485 (Mich. Ct. App. 1973) ("[A]n injunction is always subject to modification or dissolution if the facts merit it."); *accord* Misch v. Lehman, 144 N.W. 556, 557 (Mich. 1913) (permitting modification of injunction if future circumstances made the injunction inequitable).

the absence of the consent of the original parties,[98] which GM certainly was unlikely to grant. The Supreme Court did not directly address this argument,[99] and it will not be a major focus of this Article.

None of the approaches summarized above is limited in application to consent judgments. Even without consideration of the proper application of preclusion principles to consent judgments, the language used to describe the preclusive effects given to judgments generally can prove difficult,[100] involving subtle, overlapping concepts.[101] To facilitate understanding of the parties' positions, and the ruling announced by Justice Ginsburg, certain traditional terms and definitions must be examined.[102]

A. The Common Law of Preclusion by (Mostly Litigated) Judgment

A central goal of litigation is dispute resolution[103] and, relative to this overarching goal, common law preclusion principles serve two important aims: "the avoidance of repetitive litigation and the promotion of finality

---

98. *See, e.g.*; Draughn v. Hill, 186 N.W.2d 855, 857-58 (Mich. Ct. App. 1971) (discussing the general rule that consent judgments are unassailable by third persons). *But see* Township of Shelby v. Liquid Disposal, Inc., 246 N.W.2d 384, 386 (Mich. Ct. App. 1976) (recognizing an exception to the general rule that permits a court, when ruling on a motion for contempt, to modify a consent judgment that has an adverse impact on third persons); *cf.* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992) (permitting court to modify consent decree despite objections of original party). The Court noted that

> [a] consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.

Id.; System Fed'n No. 91 v. Wright, 364 U.S. 642, 647 (1961) (noting that a court errs when it refuses to modify an injunction or consent decree in light of changed factual or legal conditions).

99. *See Baker*, 118 S. Ct. at 665 n.9 (discussing antisuit injunctions).

100. *See* Erichson, *supra* note 87, at 945 ("Res judicata is hard enough already. Consider it at the interjurisdictional level, and we are asking for headaches. But consider it at that level we must, because litigation trends make interjurisdictional preclusion more important than ever." (footnote ommitted)).

101. *See generally* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §§ 11.7- 11.24 (4th ed. 1992) [hereinafter JAMES JR. ET AL] (discussing preclusion between same parties and against nonparties); Erichson, *supra* note 87, at 945 (providing a more complete examination of preclusion principles).

102. One treatise has noted that unnecessary confusion may be caused by attempting to use traditional preclusion terms in discussing consent judgments: "It might . . . be better to disregard the res judicata vocabulary of preclusion by judgment, for fear that incomplete analogies may lead to inadequate results." WRIGHT ET AL., *supra* note 7, § 4443, at 381 (advocating the use of contractual enforcement terms to analyze most preclusive effects given to consent judgments). The need for caution in analyzing preclusive effects of consent judgments is discussed in greater depth at Part III.C.

103. *See* JAMES, JR. ET AL., *supra* note 101, § 11.2, at 581 ("[T]he purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy.").

of judgments."[104] Thus,

> [f]or the litigant, finality is an important goal; the purpose of litigation is dispute resolution, and the parties want a resolution that they can rely on. A certain and final resolution permits the parties to order their affairs and plan in a sensible way; otherwise, they cannot. Society is no less interested in finality than are the litigants. Resolving a single dispute more than once wastes limited societal resources.[105]

The central policy behind the common law can be summarized as "one trial of an issue is enough."[106] Caution must be exercised, however, in applying this shorthand definition, for it competes with another maxim: "'everyone should have his own day in court.'"[107] As Justice White noted on behalf of a unanimous Supreme Court in 1971, a court being asked to apply preclusion principles must determine "'whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate' the issue because due process prohibits estoppel when a party never had an opportunity to present evidence."[108]

An analysis of *preclusion by judgment* begins with the common law definitions for key terms. Used generically, *res judicata* refers both to *res judicata* and *collateral estoppel.* In their more narrow sense, these individual terms often have been replaced by *claim preclusion* and *issue preclusion* respectively. Justice Ginsburg provided a useful summary of these definitions:

> "Res judicata" is the term traditionally used to describe two discrete effects: (1) what we now call claim preclusion (a valid final adjudication of a claim precludes a second action on that claim or any part of it) and (2) issue preclusion, long called "collateral estoppel" (an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a

104. *Id.* § 11.26, at 625; *see also* Allen v. McCurry, 449 U.S. 90, 94 (1980) ("As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").

105. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 106[a], at 311 (2d ed. 1993).

106. *See* SCOLES & HAY, *supra* note 4, § 24.1 at 950; *see also* Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522, 525 (1931) (finality of judgments comports with public policy goals).

107. Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4449, at 417 (1981)).

108. *See* SCOLES & HAY, *supra* note 4, § 24.1.A, at 952 (quoting Blonder-Tongue Labs., Inc., v. University of Illinois Found., 402 U.S. 313, 329 (1971)).

subsequent action, whether on the same or a different claim).[109]

Proper application of these terms depends on the relationship between the court that issued the judgment and the parties who are bound—and with other persons or entities who may be affected.[110]

> Underlying the rules of res judicata is the notion that persons who have had an opportunity to litigate a matter may justly be denied an opportunity to litigate it on another occasion. Such persons include those who are the named parties to an action and who appear or are validly served with process in the action. The rules of res judicata are applied most frequently to *parties* in this strict sense.[111]

As seen in *Baker*, problems arise when there is an attempt by the parties or the court to extend the reach of the judgment to persons not strictly "parties" to the original judicial proceedings.

Preclusion principles sometimes work a hardship on one or more parties and may be perceived to be "unfair." If a party believes that a trial decision is wrong or that it occurred, for example, because of physical problems that prevented her from obtaining necessary evidence to present her case completely, rules of procedure function together with preclusion principles to limit the unhappy party's remedies. She may seek reversal or modification through direct appeal or, subject to time limitations, by asking the rendering court to reopen or set aside the judgment through rules such as Federal Rule of Civil Procedure 60.[112] Collateral attack by a separate suit generally is barred,[113] except to the extent that

---

109. Baker v. General Motors Corp., 118 S. Ct. 657, 664 n.5 (1998) (citations omitted); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980) (defining issue preclusion). An earlier summary than *Baker* emphasizes the role of parties in these definitions: "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"; whereas, "[u]nder collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 467 n.6 (1982).

110. *Compare* RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 109, § 34(2) ("A party is bound by and entitled to the benefits of the rules of res judicata with respect to determinations made while he was a party."), *with id.* §§ 43-63 (describing substantive legal relationships which may result in preclusion applying to persons who are not, strictly speaking, parties).

111. JAMES JR. ET AL., *supra* note 101, § 11.7, at 586 (emphasis added) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 34 (1980)).

112. *See* FED. R. CIV. P. 60 (providing a means for seeking relief from judgments or orders based on clerical mistakes, mistakes of the parties, newly discovered evidence, fraud, etc.).

113. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (noting that "[a] judgment merely voidable because based upon an erroneous view of the law is not

jurisdiction issues may survive the original judgment when enforcement is sought in a separate suit.[114]

A modern trend in preclusion law has been to stress the need for judicial finality, which is in large part the consequence of pressures imposed by increasingly crowded court dockets.[115] This trend is manifested in the willingness of courts to expand recognition of preclusive effects created by a judgment.[116] For example, modern pleading rules permit parties to join multiple claims and to amend claims in response to challenges about the legal sufficiency of pleadings, thus expanding the scope of what might be resolved in any first suit.[117] The corresponding trend in the common law of claim preclusion is to recognize "that a judgment against plaintiff is preclusive not simply when it is on the merits but when the procedure in the first action afforded plaintiff a fair opportunity to get to the merits."[118] Similarly, though traditional principles of issue preclusion limit the preclusive effect to issues actually litigated by the exact same parties,[119] in recent years many courts have expanded the opportunities for issue preclusion; for example, some courts have dropped the requirement of "mutuality" of parties for offensive collateral estoppel purposes.[120]

---

open to collateral attack, but can be corrected only by a direct review").

114. *See* Molen v. Friedman, 75 Cal. Rptr. 2d 651, 655 (Cal. Ct. App. 1998) ("A collateral attack will lie only for a claim that the judgment is void on its face for lack of personal or subject matter jurisdiction or for the granting of relief which the court has no power to grant.") (citations omitted); Davis v. Haas & Haas Inc., 694 N.E.2d 588, 590 (Ill. App. Ct. 1998) (stating that lack of subject matter jurisdiction by the rendering court leaves the judgment vulnerable to collateral attack); State v. Belmarez, 577 N.W.2d 264, 271 (Neb. 1998) (limiting collateral attack to lack of personal and subject matter jurisdiction); Hixson v. Plump, 704 A.2d 1159, 1161 (Vt. 1997) (stating that collateral attack is available where a court lacks subject matter or personal jurisdiction, or acts *ultra vires*); Slaughter v. Virginia, 284 S.E.2d 824, 826 (Va. 1981) (lack of personal jurisdiction voids a judgment); Osborn v. Painter, 909 P.2d 960, 964 (Wyo. 1996) (stating that a judgment void for lack of jurisdiction may be attacked collaterally "only where the invalidity appears on the face of the record" but must be attacked directly "[w]here the invalidity does not appear on the face of the record").

115. *But see* Jack L. Johnson, Comment, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of A Nonparty's Claim*, 68 TUL. L. REV. 1303, 1307, 1309, 1316-18 (1994) (disputing justification for extension of preclusion by loosening the privity requirement).

116. *See* JAMES JR. ET AL., *supra* note 101, § 11.2, at 580-81.

117. *See, e.g.*, FED. R. CIV. P. 8(a) ("Relief in the alternative or of several different types may be demanded."); FED. R. CIV. P. 13 (compulsory and permissive counterclaims); FED. R. CIV. P. 15 (allowing amended and supplemental pleadings).

118. JAMES JR. ET AL., *supra* note 101, § 11.16, at 607.

119. "Mutuality" is a doctrine, also seen in contract law, by which neither party is deemed bound unless both parties are bound. *See* BLACK'S LAW DICTIONARY 1021 (6th ed. 1990).

120. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329, 331-33 (1979) (permitting offensive collateral estoppel, thereby allowing plaintiff to foreclose defendant from "reliti-

Courts following this trend have emphasized that as long as issue preclusion is applied against persons who were "parties or their privies" in the first suit, due process is not offended because such persons are deemed to have had a day in court on the issue.[121]

Of course, another aspect of the modern trend has been expansion of the definition of "parties or their privies" who will be subject to preclusion by judgment.[122] Despite this movement, the courts generally have acted with restraint when there is an attempt to apply preclusion to a person who was not a formal party to the judgment in the first action:

> [T]he bases on which a judgment can be given a preclusive effect against a nonparty can be grouped into two categories: preclusion by representation, and preclusion by reason of substantive legal relationships. These two categories are in many respects related because, as we shall see, the substantive legal relationships that result in preclusion have an element of representation. *Broadly speaking, the question posed in applying preclusion on either of these bases is whether the relationship*

---

gating" an issue defendant previously litigated unsuccessfully in suit involving a different party); Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313, 350 (1971) (eliminating the requirement of mutuality of parties in applying collateral estoppel to bar relitigation of issues decided earlier in federal suits); *see also* Howard M. Erichson, *Use It or Lose It, Dealing with Issue Preclusion in Complex Cases*, 148 N.J. L.J. 204 (1997).

> Offensive nonmutual issue preclusion refers to a new claimant's assertion of issue preclusion to inflict liability against a defendant who previously lost on that issue, in contrast to defensive issue preclusion, where a party asserts issue preclusion to shield itself from liability to a claimant who previously lost on that issue.

Id.

121. *See generally* Tyus v. Schoemehl, 93 F.3d 449, 454, 458 (8th Cir. 1996) (dismissing claim of African American plaintiffs in voting rights action on ground of "virtual representation" by interests of another group of minority members, emphasizing that preclusion based on "privity" is a recognized exception to the tradition that everyone should have his own day in court); Major v. Frontenac Indus., Inc., 968 S.W.2d 758, 762 (Mo. Ct. App. 1998) (requiring garnishee to pay damages that had been awarded to garnishor in prior suit against garnishee's insured because the interests of the nonparty in the prior suit, the garnishee, were "so closely related to the interests of the . . . [garnishee's insured that] the nonparty can be fairly considered to have had his day in court").

122. *See* Richards v. Jefferson County, 517 U.S. 793, 798 (1996). In *Richards*, the United States Supreme Court stated:

> of course, [preclusion] principles do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is "privity" between a party to the second case and a party who is bound by an earlier judgment. For example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust. Moreover, although there are clearly constitutional limits on the "privity" exception, the term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.

Id. (citing RESTATEMENT (SECOND) OF JUDGMENTS § 4 (1980)).

> *between the person who was a party and the person whom the party is treated as representing is such that the absentee's interests can be regarded as having been fairly represented by the party.*[123]

Frequently, the constitutional basis for this restraint has been described as sounding in due process.[124] The accuracy and scope of this statement, however, are called into question, as will be seen by the Court's decision in *Baker*.

B. The Relationship between Common Law Preclusion and Full Faith and Credit

The relationship of claim and issue preclusion to full faith and credit[125]

---

123. JAMES JR. ET AL., *supra* note 101, § 11.27, at 626 (emphasis added). *See generally* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2252 (1997) (rejecting a class action settlement plan because the plan did not satisfy the requirements of common issue predominance and adequacy of representation); *Richards*, 517 U.S. at 797 (condemning "extreme" applications of nonparty preclusion). *But see* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 196, 198, 289 (1992) (urging expansion of nonparty preclusion).

124. The importance of due process as a restraint on common law preclusion was identified quite early by the Supreme Court:

> The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 476 (1918) (citations omitted), *quoted with approval in Richards*, 517 U.S. at 797 n.4 (holding that a state's right to apply preclusion principles is limited by due process); *see also* JAMES JR. ET AL., *supra* note 101, § 11.27, at 627 ("The scope of preclusion applied to nonparties is constrained by due process considerations, as seen in *Martin v. Wilks*.").

125. The requirement of "full faith and credit" derives from Article IV, Section 1 of the Constitution. *See supra* note 3 and accompanying text. By its own terms, the constitutional provision applies only to the states. The Full Faith and Credit Act, 28 U.S.C. § 1738 (1994), provides that federal courts are obligated to give the same recognition to state court judgments as would other courts of that state. While no statutory or constitutional provision specifically states an obligation of the states to give full faith and credit to the judgments of federal courts, this principle has been recognized and applied uniformly. *See* Uniform Enforcement of Foreign Judgments Act ("UEFJA"), 13 U.L.A. 149 (1964) (adopted in 48 states and the Virgin Islands); *see also, e.g.*, Stoll v. Gottlieb, 305 U.S. 165, 170 (1938). There is no substantive difference in the effect of the "full faith and credit command," as Justice Ginsburg refers to it in *Baker*, in its constitutional form as opposed to its statutory source. *See, e.g.*, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 483-84 n.24 (1982) (explaining that § 1738 was enacted to "implement" the Full Faith and Credit Clause and to ensure that federal courts were bound by state judgments); Bigelow v. Old

is fairly easy to describe, but, as the history of *Baker v. General Motors* demonstrates, it is more difficult to understand in practice.[126] Full faith and credit has been interpreted as federalizing the application of claim and issue preclusion.[127] Under full faith and credit, the F-2 court must give the same credit as the F-1 court would give its own judgment, but no more.[128]

Because of the relationship between preclusion principles and full faith and credit, the Supreme Court often has emphasized that the "first step" in analyzing an enforcement question involving full faith and credit is to determine the rendering state's law on claim and issue preclusion.[129] "If

---

Dominion Copper Mining and Smelting Co., 225 U.S. 111, 129 (1912) (stating that a federal judgment is entitled to the *same sanction* that would attach to the like judgment of a court of that state). For purposes of discussing *Baker*, it is unnecessary to distinguish the source of the full faith and credit command, since arguably both the constitutional provision and the statute apply. Although the *Baker* case tested the effect of the Michigan judgment in federal court in Missouri, it did so on the basis of diversity. Thus, both state-to-state (Article IV) and state-to-federal (§ 1738) patterns exist. *But see* Hannah v. General Motors Corp., 969 F. Supp. 554, 559 (D. Ariz. 1996) ("[A]s a court sitting in diversity, it is the full faith and credit clause that would require it to enforce the Michigan injunction, not § 1738. As a result the court must look to the policies of the forum state, in this case the state of Arizona.").

126. *See* Erichson, *supra* note 87, at 997.

127. *See* RICHMAN & REYNOLDS, *supra* note 105, § 107, at 316 ("[T]he governing law of full faith and credit might be described as the interstate application of the doctrines of claim preclusion and issue preclusion."); *see also* Degnan, *supra* note 1, at 773 (advocating a broad statement of res judicata: "A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.") (emphasis removed).

128. *See* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 384 (1985). Some commentators consider the possibility of "more" effect for judgments to be an open question under full faith and credit, while other commentators treat the question as having been answered in the negative by the Supreme Court's decision in *Marrese*. *Compare* SCOLES & HAY, *supra* note 4, § 24.1.B, at 954 (arguing that granting "*additional* preclusive effect" is an open question), *with* RICHMAN & REYNOLDS, *supra* note 105, § 107, at 318-22 (arguing that F-2 courts do not have the latitude to expand the preclusive effect of an F-1 judgment).

129. *See, e.g.*, Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 522 (1986) (holding the court of appeals erred by failing to consider the preclusive effect the state court would give to its own judgment); *Marresse*, 470 U.S. at 384 (remanding for federal court to consider state law on preclusive effect of state court judgment); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 87 (1984) (remanding to permit federal district court in § 1983 claim to interpret Ohio preclusion law regarding effect of its prior judgment); Haring v. Prosise, 462 U.S. 306, 323 (1983) (recognizing that under rules of collateral estoppel adopted by Virginia courts, no preclusive effect is given to guilty pleas; therefore, judgment of conviction did not preclude § 1983 claim challenging propriety of police search); Barber v. Barber, 323 U.S. 77, 81, 86 (1944) (looking to North Carolina law to determine effect of North Carolina judgment awarding alimony).

the state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater efficacy' under 1738."[130] This step is important because the common law of preclusion by judgment is not uniform among the states, with some states following modern trends and other states adhering to mutuality and similarly strict prerequisites.[131] Futhermore, as suggested at Part II.C, some states specifically restrict the preclusive effect of consent judgments available under the common law.[132]

In *Baker v. General Motors*, Justice Kennedy's separate opinion,[133] concurring in the judgment, emphasized this traditional approach. According to Kennedy, the threshold step should have been to determine the effect the Michigan judgment would have had in Michigan:

> The beginning point of full faith and credit analysis requires a determination of the effect the judgment has in the courts of the issuing State. In our most recent full faith and credit cases, we have said that determining the force and effect of a judgment should be the first step in our analysis. . . . A conclusion that the issuing State would not give the prior judgment preclusive effect ends the inquiry, making it unnecessary to determine the existence of any exceptions to full faith and credit. We cannot decline to inquire into these state-law questions when the inquiry will obviate new extensions or exceptions to full faith and credit.[134]

Justice Kennedy concluded, based on his review of state law, that Michigan law does not give preclusive effect to judgments as against nonparties, regardless of whether the judgment sounds in law or equity.[135]

---

130. *Prosise*, 462 U.S. at 313 n.6 (quoting Union & Planters' Bank v. Memphis, 189 U.S. 71, 75 (1903)).

131. *See* RICHMAN & REYNOLDS, *supra* note 105, § 107[c] at 318 ("The states differ on several questions: the dimensions of a cause of action . . ., the kinds of dismissals which are 'on the merits,' the persons who are considered to be parties and privies, and the rules of mutuality.").

132. *See* James, *supra* note 7, at 180; Sheldon R. Shapiro, Annotation, *Modern Views of State Courts as to Whether Consent Judgment Is Entitled to Res Judicata or Collateral Estoppel Effect*, 91 A.L.R.3D 1170, 1173-74 (1979 & Supp. 1997).

133. Justice Scalia also wrote a short, separate opinion concurring in the judgment, which provides little in the way of analysis. *See* Baker v. General Motors Corp., 118 S. Ct. 657, 668 (1998) (Scalia, J., concurring).

134. *Id.* at 671 (Kennedy, J., concurring) (citations omitted).

135. *See id.* at 671 (citing Nummer v. Treasury Dep't, 533 N.W.2d 250, 253 (Mich. 1995) (requiring mutuality of parties for estoppel to apply)). Justice Kennedy reasoned, "[s]ince the Bakers were not parties to the Michigan proceedings and had no opportunity to litigate any of the issues presented, it appears that Michigan law would not treat them as bound by the judgment." *Id.*; Lichon v. American Universal Ins. Co., 459 N.W.2d 288, 298 (Mich. 1990) (requiring mutuality of parties and actual litigation of issue, elements

Thus, GM had failed to satisfy its burden of persuasion to show that Michigan courts would have bound the Bakers to the terms of the earlier injunction prohibiting Elwell from testifying.[136]

> In all events, determining as a threshold matter the extent to which Michigan law gives preclusive effect to the injunction eliminates the need to decide whether full faith and credit applies to equitable decrees as a general matter or the extent to which the general rules of full faith and credit are subject to exceptions. Michigan law would not seek to bind the Bakers to the injunction and that suffices to resolve the case.[137]

Thus, if F-1's precedent establishes that F-1 would give the judgment neither claim nor preclusive effect if requested in F-1, there exists no constitutional or statutory full faith and credit obligation to enforce the judgment in F-2. As will be shown below, however, Justice Ginsburg rejected this formula as providing the answer to the *Baker* case.[138]

The law on full faith and credit also has developed a body of principles that help to define the preclusive effect of judgments in the interjurisdictional context. Recently, the central principle has been characterized by commentators as the "Iron Law," or iron rule, of full faith and credit, which can be traced to the seminal Supreme Court ruling in *Fauntleroy v. Lum*.[139]

> If the F-1 court has jurisdiction over both the person and the subject matter, its judgment is entitled to full faith and credit in F-2, even though that judgment is based upon a mistake of fact or law. If the losing litigant wishes to correct such an error, she must do so in F-1's courts—either on appeal or through some other type of direct attack (such as a motion to vacate or a motion for relief from judgment). Once the F-1 judgment is final according to the law of F-1, however, the Full Faith and Credit Clause prohibits collateral attack in F-2. This might be called the "Iron Law" of Full Faith and Credit.[140]

---

which were not satisfied by defendant's plea of nolo contendere); *Bacon v. Walden*, 152 N.W. 1061, 1063 (Mich. 1915) (holding prior suit's adjudication of level of lake was not binding on subsequent owner of dam where law did not consider him privy and he was not a party to original suit; prior suit's effect was limited to value as precedent); *Detroit v. Detroit Ry.*, 95 N.W. 992, 993 (Mich. 1903) (no binding effect to prior suit on nonparty).

136. *See Baker*, 118 S. Ct. at 672 (citing Detroit v. Qualls, 454 N.W.2d 374, 383 (Mich. 1990); E & G Finance Co., v. Simms, 107 N.W.2d 911, 914 (Mich. 1961)).

137. *Id.* at 673 (Kennedy, J., concurring).

138. *See infra* Part V.B (analyzing Justice Kennedy's concurrence, which noted Justice Ginsburg's concern for the affects of full faith).

139. 210 U.S. 230 (1908); *see* RICHMAN & REYNOLDS, *supra* note 105, § 111, at 339; Reynolds, *supra* note 80, at 412-13.

140. RICHMAN & REYNOLDS, *supra* note 105, § 111, at 339 (footnotes omitted); *see*

As with common law preclusion terms, the application of the iron rule of full faith and credit can be perceived as creating an excessively harsh or even unfair result. As described above, the primary remedy for parties and their privies is direct attack by post-judgment motion or appeal.[141] In response to these unfairness concerns, however, courts have recognized additional exceptions or defenses to full faith and credit. For purposes of discussion, and at the risk of oversimplification,[142] these exceptions can be placed into three categories: (1) an essential defect in the rendering court's judgment, usually a lack of personal or subject matter jurisdiction;[143] (2) a strong public policy asserted by the recognizing state, which is raised as a bar to sister-state enforcement;[144] and (3) "other" exceptions, derived from a narrow set of facts or dependent upon the unique subject matter of the judgment in question and its relationship to

---

Fauntleroy, 210 U.S. at 237 ("[A]s the jurisdiction of the Missouri court is not open to dispute the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law.").

141. *See* J.I.C. Elec., Inc. v. Murphy, 344 S.E.2d 835, 837-38 (N.C. Ct. App. 1986) (finding that injunction issued by Michigan court pursuant to consent judgment was entitled to full faith and credit in North Carolina courts, and that party must appeal to Michigan courts, not North Carolina courts, to seek a ruling that the injunction was void due to lack of consent).

142. *Compare, e.g.*, RICHMAN & REYNOLDS, *supra* note 105, §§ 112-13 (describing exceptions based on problems with the F-1 decree and exceptions arising out of F-2's ability to ignore a valid F-1 judgment, and the dilemma of the public policy exception embodied in section 103 of the RESTATEMENT (SECOND) CONFLICTS); *and* SCOLES & HAY, *supra* note 4, § 24.2.C, at 972-996 (discussing at length "defenses" to sister state judgments, including procedural defects in judgment and public policy considerations), *with* Allan D. Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33, 43 (1963) (listing three general categories of "exceptions or limitations," including "(1) a jurisdictional limitation, (2) a limitation based upon the policy of the forum state, and (3) the limitations inhering in the first judgment").

143. It has been noted by commentators that

> [t]he older case law held that the Full Faith and Credit Clause . . . [does] not preclude on [sic] inquiry into the jurisdiction of the first court to render the judgment sought to be enforced. . . . It must be noted . . . that this rule . . . has been limited severely by the application of [modern] principles of res judicata. The rule therefore remains categorically true only when the judgment debtor did not litigate the jurisdictional issue in the first forum or had no opportunity to do so *and* the first forum, on the facts of the case, lacked jurisdiction.

SCOLES & HAY, *supra* note 4, § 24.2.C.1, at 972-73 (footnote omitted).

144. *Compare* RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, § 117, at 339 ("A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim."), *with id.* § 103, at 312 ("A judgment rendered in one State . . . need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.").

the recognizing state.[145] Of these categories,[146] only the lack of personal jurisdiction over the purportedly "bound" party in the state that rendered the judgment is accepted uniformly and defined clearly as a valid interjurisdictional exception or defense to the full faith and credit command. In particular, the "public policy exception" has generated strong criticism by scholars and, in recent years, has generated expressions of distaste from the Supreme Court.[147]

Finally, distinctions between *preclusion by judgment* and the use of

---

145. *See* Fall v. Eastin, 215 U.S. 1, 7, 11 (1909) (holding that because the Washington court that granted the divorce decree and ordered husband to convey Nebraska property to wife did not have jurisdiction to affect title to land in Nebraska, full faith and credit did not require Nebraska courts to enforce the Washington court order). "The majority opinion in *Fall* stands for the principle that one state cannot directly affect title to land located in another state." RICHMAN & REYNOLDS, *supra* note 105, § 112, at 348 (footnote omitted); *see* Thomas v. Washington Gas Light Co., 448 U.S. 261, 283-84, 285-86 (1980) (plurality opinion) (permitting successive workers' compensation awards and noting the first award of the Virginia Industrial Commission did not adjudicate the full measure of workers' rights under the law of the District of Columbia). "[I]t is tempting (and easy) to dismiss the workers' compensation cases . . . as result-oriented decisions born of the Court's desire to protect the injured worker at all costs." RICHMAN & REYNOLDS, *supra* note 105, § 114, at 360.

146. A fourth category may exist, consisting of legislatively prescribed approaches to what would otherwise be full faith and credit issues; such as interstate child support and custody suits. *See* UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (amended 1958) §§ 1, 35-37, 39-40, 9B U.L.A. 394, 540-41, 543-44, 546 (1987) (1968 Revised Act); UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT (amended 1958) §§ 34-38, 9B U.L.A. 603-06 (1987) (1950 Act); UNIFORM CHILD CUSTODY JURISDICTION ACT (amended 1958) §§ 1, 3, 15, 9 U.L.A. 123-24, 143-44, 311 (1988 & Supp. 1991); UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, (WESTLAW, 1998 Electronic Pocket Part, approved through July 1997); *see also* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994) (requiring, by statute, full faith and credit in child custody determinations).

147. One commentator has noted the following:

> Section 103 [of the *Restatement (Second) of Conflicts*] takes the quite controversial position that there are some F-1 judgments that are perfectly valid under the Due Process Clause, yet not entitled to full faith and credit in F-2. . . . Despite Justice Stone's eloquence [in his dissent in *Yarborough v. Yarborough*, 290 U.S. 202, 213-23 (1933) (Stone, J., dissenting)] and the prestige of the American Law Institute, it is quite doubtful that Section 103 provides an accurate statement of the law.

Reynolds, *supra*, note 80, at 436, 438; *see* ALBERT A. EHRENZWEIG & DAVID W. LOUISELL, JURISDICTION IN A NUTSHELL § 36-1, at 138 (3d ed. 1973) (describing section 103 as unsupported by "authority, policy, or reason"); Ronald A. Hecker, Comment, *Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 CALIF. L. REV. 282 (1966); *accord*, Baker v. General Motors Corp., 118 S. Ct. 657, 664 n.6 (1998) (citing scholarship that criticizes the use of the term "public policy" to rationalize a result on choice of law perogatives); Howlett v. Rose, 496 U.S. 356, 382 n.26 (1990) (citing cases that held a state must honor sister state judgments even though "obnoxious" to its own public policy).

judgments, or more accurately, decisions, as *precedent* should be noted. The common law doctrine of *stare decisis* is a mandate that courts should apply precedent by giving appropriate weight to the prior determinations of courts on issues of law.[148] Preclusion is not a concept associated with this doctrine, and full faith and credit has only minimal impact on its application.[149] "A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party."[150] Care should be taken not to blur the line between the doctrines of preclusion and *stare decisis*, so as to avoid improper interpretations of the full faith and credit command.[151]

C. *A Cautionary Note: Interjurisdictional Preclusion Principles Applied to Consent Judgments May Give Rise to Specific Fairness Concerns*

Early Supreme Court consideration of full faith and credit enforcement questions did not distinguish between litigated and consent judgments. For example, in 1933, in *Yarborough v. Yarborough*,[152] the Supreme Court ruled that under the Full Faith and Credit Clause, a Georgia consent judgment setting forth the father's obligation to pay support to his daughter was a bar to the daughter's subsequent suit in South Carolina.[153] The majority found it irrelevant to the full faith and credit concerns that the consent judgment, which represented a settle-

148. *See* JAMES JR. ET AL., *supra* note 101, § 11.6, at 585.

149. The Supreme Court's decisions in *Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532 (1935), and *Pacific Employers Insurance Co. v. Industrial Accident Commission of California*, 306 U.S. 493 (1939), served to minimize the constitutional restrictions on state choice-of-law decisions. *See* Thomas v. Washington Gas Light Co., 448 U.S. 261, 272-78 (1980) (plurality opinion) (discussing the important role of *stare decisis* within the judicial system generally and within the Supreme Court, but noting this doctrine does not prohibit new analysis of the law); *see also* 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 134.02[4][a], at 134-22 (3d ed. 1998) ("The courts of one state do not owe obedience to the courts of another state, except when following the law of another state under its choice-of-law rules." (footnote omitted)).

150. Richards v. Jefferson County, 517 U.S. 793, 805 (1996) (holding that because a group of citizens challenging the application of a local occupational tax had neither notice nor sufficient representation during prior litigation regarding the constitutionality of that tax, the prior adjudication "as a matter of federal due process, may not bind them and thus cannot bar them from challenging" the tax).

151. *See infra* Part V.B and notes 248-49 (discussing the consequences of ignoring distinctions between preclusion and *stare decisis*, specifically in the context of nonparties).

152. 290 U.S. 202 (1993).

153. *See id.* at 204, 212-13 (applying the Full Faith and Credit Clause, refusing to consider the interests of South Carolina in the litigation); *see also* Fall v. Eastin, 215 U.S. 1, 7, 13-14 (1909) (declining to require transfer of title to real property under full faith and credit without considering equities of divorce settlement decree).

ment of all divorce issues between the mother and father, may not have been a fair resolution of the daughter's future support needs.[154] Over the years, the Supreme Court frequently has resolved issues of preclusion by judgment, but has not resolved the question of whether special fairness concerns exist in the context of consent judgments.[155]

In 1959, however, an influential article by Professor Fleming James Jr., described an important distinction between the appropriate scope of common law preclusion for litigated versus consensual judgments.[156] Professor James noted that although courts generally give *claim* preclusive effect to consent judgments, the courts are, and in his belief should be, reluctant to find *issue* preclusive effect arising from such an order. Professor James therefore concluded that a "consent judgment should not be given any effect as collateral estoppel except in the rare case where it may fairly be said that the parties intended this effect."[157] Even where the parties stipulated factual and legal conclusions, he emphasized that the common law does not require that recitals be accorded binding effect in subsequent actions, because the "rules pertaining to judgments do not require it," since an essential element for preclusion, actual litigation on the merits, is missing.[158]

---

154. As discussed more fully in Part V, Justice Stone's dissent in *Yarborough* rejected strict application of full faith and credit. *Yarborough*, 290 U.S. at 222-27 (Stone, J., dissenting).

155. *See* Martin v. Wilks, 490 U.S. 755, 761-66, 769 (1989) (declining to give preclusive effect to consent decree that settled employment practices with respect to black firefighters as against nonparty white firefighters, but deciding the issue on joinder grounds); Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529-30 (1986) (permitting parties to resolve employment practices suit by consent decree, including issues that were not susceptible to court adjudication, despite union's intervention and objection to unfairness of decree's impact on nonminority employees). *But see* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383-85, 393 (1992) (recognizing need for flexibility in consent decrees arising out of "institutional reform litigation" and permitting modification of decree under Fed. R. Civ. P. 60(b) over objection of inmates).

156. *See* James, *supra* note 7, at 173-74; *see also* Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1314-15 (1959).

157. James, *supra* note 7, at 175.

158. *Id.* at 180 (emphasis removed).

> Even where the parties have stipulated to the existence or nonexistence of certain facts and the judgment recites them expressly or by implication, the rules governing collateral estoppel do not require that these recitals be given binding effect between the parties subsequently pursuing different claims and demands against each other. We have seen that if the parties' agreement is construed to embrace such a binding effect their intent to be bound will generally be given effect; but this is by virtue of the contractual aspect of the matter. The point here made is that if the *agreement* is not construed to call for such binding effect, then the *rules pertaining to judgments* do not require it. This is so because the parties have not fully contested such an issue; they have agreed upon it instead of sub-

In urging caution when inferring preclusive intent, Professor James was concerned primarily with attempts to use consent judgments to create binding consequences for parties to tort actions and their insurers, a type of third party issue that existed more often before the expansion of the definition of "privies."[159] Several states,[160] including Michigan,[161] have adopted and continue to apply Professor James's limitations on the preclusive effects of consent judgments. Additionally, the Supreme Court has in one instance declined to assume issue preclusion created by consent judgment, rejecting the argument of a private individual who attempted to bind the Federal Government to the depreciation basis used in a prior consent decree to determine his tax liability in future years.[162]

Although not addressing directly the *Baker* case situation, which raises questions about the permissible effects of a consent judgment on the interests of true nonparties, Professor James's analysis is important because it demonstrates, from the standpoint of traditional preclusion law, that it is *not* necessary for courts to give consent judgments the same preclusive effects as litigated judgments. Even though his analysis centered on the procedural prerequisites for issue or claim preclusion, Professor James implicitly recognized that it may not be appropriate to equate consensual and litigated judgments.

In recent years, commentators have raised other concerns about preclusion by consent judgments, focusing more directly on the fairness of the outcome and the effects on nonparties, also referred to as third parties.[163] The debate frequently focuses on public interest litigation, such as

---

mitting it to the tribunal for determination.

Id. (footnotes omitted).

159. *See id.* at 189-92. *But see* Continental Cas. Co. v. Westerfield, 961 F. Supp. 1502, 1509 (D.N.M.), *aff'd sub nom* Continental Cas. Co. v. Hempel, 108 F.3d 274 (10th Cir. 1997) (finding a settlement agreement and stipulated judgment collusive and denying preclusive effect, but noting that nonparty insurers are still bound by their obligations).

160. *See* Shapiro, *supra* note 132, at 1183-87 (noting representative cases from several states declining grant of preclusive effect to consent judgments).

161. *See* American Mut. Liab. Ins. Co. v. Michigan Mut. Liab. Co., 235 N.W.2d 769, 776 (Mich. Ct. App. 1975) ("Nothing is adjudicated between two parties to a consent judgment."); *see also infra* Part V.B (analyzing Justice Kennedy's concurrence and emphasizing his "first step" analysis focusing on Michigan law).

162. *See* United States v. International Bldg. Co., 345 U.S. 502, 505-06 (1953) (holding parties' consent decree for tax liability in years 1933, 1938 and 1939 was not determinative of depreciation of property for 1943-45 and questioning scope and motivation for settlement).

163. In 1987, *The University of Chicago Legal Forum* hosted an important symposium entitled *Consent Decrees: Practical Problems and Legal Dilemmas*, which was documented in its 1987 journal issue. *See, e.g.*, Owen M. Fiss, *Justice Chicago Style*, 1987 U. CHI. LEGAL F. 1, 1-4 (noting the problems and dangers of consent decrees); Resnik, *supra* note 6, at 44 (questioning the proper role of the judge during negotiation and entry of consent

class actions, in which Federal Rule of Civil Procedure 23 obligates the court to review the fairness of at least some aspects of any settlement or dismissal.[164] Some commentators believe the review process is inadequate.[165] For example, there is criticism that absent class members may not be represented fairly,[166] that the F-1 court may be motivated to minimize third persons' concerns due to a desire to relieve overcrowded dockets and efficiently resolve cases,[167] and that consent judgments often enshrine unequal bargaining positions.[168] Other commentary has specifically focused on the unlikelihood that the F-1 court can identify nonparty interests, as consent judgments are drafted and presented solely from the viewpoint of the settling parties.[169] These concerns have led some commentators to urge adoption of new procedures to govern or restrict the entry of consent judgments by trial courts.[170] In addition, as demonstrated by the history of the Elwell/GM consent judgment, recent litigation practices generate reasons for concern about the appropriate scope

---

decrees). *But see* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 19-21, 30-31, 34 (considering consent decrees attractive alternative settlement tools, although admitting that affected third parties may deserve access to a safety valve in the form of permissible collateral attack rules).

164. *See* FED. R. CIV. P. 23(e) (providing that a class action will "not be dismissed or compromised without the approval of the court").

165. *See* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1053-57, 1122-23, 1280 (1996) (discussing abuse of court approved settlements in class actions, criticizing "facade of estoppel" and judges who approve unfair settlements, finding wholly inadequate the review procedures under current Rule 23, and concluding, only partly in jest that the only solution is to sue the lawyers responsible for certain consent decrees). *See generally* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988) (criticizing the current system of review); Richard A. Epstein, Wilder v. Bernstein: *Squeeze Play by Consent Decree*, 1987 U. CHI. LEGAL F. 209 (analyzing the fairness of consent decrees through an analysis of *Wilder v. Berstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986)).

166. *See* Laycock, *supra* note 24, at 103-04 (proposing that courts should be prohibited from approving consent decrees unless participation and consent of all affected parties are secured).

167. *See* Resnik, *supra* note 6, at 101 (noting the mixed role of the judge in many class action settlements in pressing litigants for settlements and ruling on the fairness of the agreements formed).

168. *See* Fiss, *supra* note 163, at 2, 4 (noting that "[s]ettlements are especially likely to reflect the inequalities of power and resources that the parties bring to the bargaining table . . . . [C]onsent decrees are in one important respect worse than purely contractual settlements. This defect arises from the fact that they constitute an appropriation of a public power.").

169. *See* Resnik, *supra* note 6, at 101 (concluding that "judges cannot, absent conflict, determine much about the legality or the quality of the compromises made").

170. *See* Kramer, *supra* note 165, at 323-24 (proposing replacement of the collateral attack bar with the consolidation of third party claims and use of consent proceedings); Laycock, *supra* note 24, at 104 (proposing that consent decrees that affect third persons be subject to unilateral consent or be nonbinding upon such individuals).

of interjurisdictional preclusion for consent judgments. At the time of Elwell's suit, GM had two overlapping problems: an ex-employee who wanted more money, and a multitude of plaintiffs across the United States who were claiming GM's engine designs were defective in ways the ex-employee seemed eager to describe. Certainly, there were privileged aspects to Elwell's knowledge, as some of his information was generated by his role as a member of the GM attorney defense team in prior tort cases.[171] GM understandably wished to prevent, once and for all, Elwell from testifying and thereby disclosing confidential or privileged information. Litigating the privilege issues in each of the product liability cases undoubtedly seemed risky to GM, not to mention expensive. Because Elwell appeared willing to concede the privileged nature of his knowledge, or at least willing to do so if paid enough money, GM seized upon the most direct route to capture this concession by writing a broad, final order prohibiting all testimony.

The *Baker* litigation may represent a different breed of consent judgments than was encountered by the Supreme Court in early cases such as *Yarborough*. The Elwell/GM consent judgment represents a distinct instance in which at least one party intended to affect the important interests of nonparties across the nation, even if GM was technically correct in its denial of an attempt to "bind" these nonparties. A mere settlement agreement binding Elwell was unsatisfactory to the corporation. GM's goal was the tremendous and positive impact a binding consent judgment would have on its troublesome product liability suits. This goal emphasizes the nonjudicial role of the judge in consent judgments generally, which in turn suggests caution is appropriate in assigning such judgments interstate effectiveness. For example, by comparison, the Supreme Court has declined to treat unconfirmed arbitration awards as "judicial proceedings" for purposes of full faith and credit.[172] As modern consent judgments become increasingly concerned with third party claims and, arguably, seek to manipulate these interests, it may be that the tradition of treating litigated judgments and consent judgments as the same for purposes of full faith and credit requires reconsideration.[173]

---

171. *See supra* notes 45-46 and accompanying text (discussing stipulations of the Elwell/GM parties).

172. *See* McDonald v. City of West Branch, 466 U.S. 284, 287-88 (1984) ("Arbitration is not a 'judicial proceeding' and, therefore, § 1738 does not apply to arbitration awards."); *see also* University of Tenn. v. Elliott, 478 U.S. 788, 794, 798-99 (1986) (holding issue preclusion for state administrative proceedings is not required by Full Faith and Credit Act, but by federal common law preclusion policies).

173. *See infra* note 195 (discussing oral argument in *Baker* that emphasized the need to distinguish consent decrees from litigated judgments). A dilemma, however, may exist for

The Elwell/GM consent judgment cannot be excused or described as an anomaly, for within months of the Supreme Court's attempt in *Baker* to resolve the national interests of F-2 courts in deciding their own disputes, the next generation of consent judgment problems appeared on the horizon. For instance, a New Jersey federal district court already has rejected the decision of *Baker v. General Motors* as controlling the preclusive effect of a New Jersey consent judgment on multistate proceedings involving attorney-client privilege and a former employee's appearance at a deposition in Florida for use in California-based insurance litigation.[174]

In discussing Justice Ginsburg's important decision and its implications for interjurisdictional preclusion generally, this Article notes instances where the Court's analysis seems influenced by the "nonjudicial" nature of the Michigan judgment. As the Court attempts to identify appropriate limitations on full faith and credit, it may be overlooking an opportunity to identify, or at least to discuss, appropriate limitations on consent judgments.

IV. THE HEART OF THE MATTER: JUSTICE GINSBURG'S MAJORITY OPINION

Certiorari was granted "to decide whether the full faith and credit requirement stop[ped] the Bakers, who were not parties to the Michigan proceeding, from obtaining Elwell's testimony in their Missouri wrongful death action."[175] Despite the relatively settled nature of the principles of full faith and credit for judgments, this case was the second in two years

---

counsel or judges who view this distinction from the standpoint of substantive ideology. For example, a lawyer who may be concerned about the rights of the Bakers and similarly situated plaintiffs faced with an evidentiary "ruling" regarding a matter that they had never argued, may at the same time represent minority interests in other cases, and thus may wish to argue that consent decrees should be permitted to have enforceable "effects" on nonparties. Compare the roles of plaintiffs' counsel in *Baker v. General Motors*, 118 S. Ct. 657 (1998), with the roles of the black firefighters' counsel in *Martin v. Wilks*, 490 U.S. 755 (1989).

174. *See* Prudential Ins. Co. of America v. Nelson, 11 F. Supp. 2d 572, 582 (D.N.J. 1998). The court in *Nelson* rejected the application of the *Baker* holding to the issue of enforcement of a New Jersey consent decree which, in settling an employment dispute, purported to prohibit privileged testimony by the corporation's former attorney. *See id.* at 579-80. The court permitted modification of the consent decree despite the fact that individuals who were challenging effects of the decree were nonparties to the decree, were involved in California litigation against insurers, and were seeking the Florida deposition. *See id.* at 582.

175. *Baker*, 118 S. Ct. at 663. The Court further noted the conflict between the Eighth Circuit and "many other lower courts [that had] permitted Elwell to testify as to nonprivileged and non-trade-secret matters." *Id.* at 663 n.2.

to be accepted for Court review that involved "judgments" created by settlement.[176]

Justice Ginsburg's analysis began with a historical look at the purpose of full faith and credit, embodied in Article IV, Section 1 of the Constitution and the Full Faith and Credit Act, and she noted cases that described it as a necessary component of the federalized system of government.[177] The opinion noted the distinction between the relatively weak credit given by the Court to legislative measures and common law[178] and the much stronger mandate as to judgments:

> Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.[179]

The opinion undoubtedly dashed the hopes of individuals concerned about same-sex marriage issues, who were looking for specific recognition of a public policy exception under the Full Faith and Credit Clause. The majority concluded, "our decisions support no roving 'public policy exception' to the full faith and credit due judgments."[180] The Supreme Court clearly was aware of scholarship that criticized the use of public policy as a means of obscuring an assertion by the forum of its own preferred substantive law.[181]

---

176. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 375 (1996). The role of Justice Ginsburg as the author of the majority decision in *Baker* was perhaps not surprising, given her history of teaching and scholarship in the area. *See generally* Ruth Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969) (examining the state of the law regarding the effect that judgments should be given in subsequent legal proceedings).

177. *See Baker*, 118 S. Ct. at 663; *cf.* Estin v. Estin, 334 U.S. 541, 546 (1948) (noting full faith and credit "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns"); Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-77 (1935) (stating that the Full Faith and Credit Clause's purpose was integration of the states into a "single nation").

178. *See Baker*, 118 S. Ct. at 663 (quoting Pacific Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939)).

179. *Id.* at 663-4 (footnote omitted).

180. *Id.* at 664. The opinion further notes that the district court misread Supreme Court precedent in basing its decision not to enforce the Michigan injunction on the public policy of Missouri favoring full discovery. *See id.*

181. *See id.* at 664 n.6. (citing Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 980-81 (1956)); *see also* Reynolds, *supra* note 80, at 438-39 (criticizing the RESTATEMENT (SECOND) OF CONFLICTS' public policy exception to full faith and credit).

With similar boldness, the majority stated that no specific exception to full faith and credit should be accorded to injunctive relief generally:[182] "The Court has never placed equity decrees outside the full faith and credit domain."[183] For traditional preclusive effect to be granted a final judgment, the Court saw no reason why a judgment affecting "parties and those 'in privity' with them" should differ because of the legal or equitable nature of the relief granted.[184]

The opinion's opening description of full faith and credit principles, almost textbook in nature, initially must have been heartening to GM. Justice Ginsburg's next statement, on the other hand, was the point of departure from traditional discussions of full faith and credit:

> Full faith and credit, however, does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law.[185]

In articulating a distinction between the obligation to give "credit" to a foreign judgment, and the non-obligation to "enforce" the judgment, the opinion cited no direct precedent, but provided what Ginsburg viewed as examples of the distinction drawn from past cases:

> Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. Thus, a sister State's decree concerning land ownership in another State has been held ineffective *to transfer title*, although such a decree may indeed preclusively adjudicate the rights and obligations running between the *parties* to the foreign litigation. And antisuit injunctions regarding litigation elsewhere, even if compatible with due process as a direction constraining parties to the decree, in fact have not controlled

182. *See Baker*, 118 S. Ct. at 665. The Court noted, however, that antisuit injunctions were a separate issue from equitable relief generally, citing *Donovan v. Dallas*, 377 U.S. 408 (1964), which held that the full faith and credit statute was inapplicable to a state court's attempt to enjoin a federal case. *See id.* at 665 n.9. The Court also implied that the Full Faith and Credit Clause may not be used to enforce state courts' attempts to enjoin other states' proceedings. *See id.*

183. *Id.* at 664.

184. *Id. But see* RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, § 102 (describing the courts' obligation to enforce sister state equitable decrees only as permissive, not mandatory).

185. *Baker*, 118 S. Ct. at 665.

> the second court's actions regarding litigation in that court. Sanctions for violations of an injunction, in any event, are generally administered by the court that issued the injunction."[186]

None of the cases cited by Ginsburg in support of the above passage involved the effects of a judgment on nonparties.[187] However, the holding of the majority in *Baker* also rested on the implications of the Elwell-GM judgment for nonparties.

As discussed above, the traditional analysis of full faith and credit, as a Constitution-based principle for enforcement of judgments, has been tied closely to the common law development of claim preclusion and issue preclusion principles.[188] Ginsburg recognized that "claim preclusion" was created by the Michigan consent judgment, thus validly binding Elwell and GM to their bargain.[189] However, the opinion rejected the use of issue preclusion principles to resolve the question of whether the consent judgment permissibly affected or impermissibly attempted to bind the Bakers.[190] Citing *Martin v. Wilks*, the majority concluded that one state's judgment cannot be used to control litigation in other courts, at least not if that litigation involves new parties.[191]

> [A] Michigan court cannot, by entering the injunction to which Elwell and GM stipulated, dictate to a court in another jurisdiction that evidence relevant in the Bakers' case—a controversy to which Michigan is foreign—shall be inadmissible. . . . [W]e simply recognize that, just as the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of Full Faith and Credit, and just as one State's judgment

---

186. *Id.* (citations and footnotes omitted).

187. *See id.* (citing Robertson v. Howard, 229 U.S. 254 (1913) (rights between parties in a foreign suit); Fall v. Eastin, 215 U.S. 1 (1909) (land title transfer); Cole v. Cunningham, 133 U.S. 107 (1890) (antisuit injunctions affecting parties); James v. Grand Trunk Western R. Co., 152 N.E.2d 858 (Ill. 1958) (same)).

188. *See supra* Part III.A (discussing the principles of claim and issue preclusion).

189. *See Baker*, 118 S. Ct. at 666 ("While no issue was joined, expressly litigated, and determined in the Michigan proceeding, that order is claim preclusive between Elwell and GM. Elwell's claim for wrongful discharge and his related contract and tort claims have 'merged in the judgment,' and he cannot sue again to recover more." (footnote omitted)).

190. *See id.* at 666 n.11.

> In no event, we have observed, can issue preclusion be invoked against one who did not participate in the prior adjudication. . . . [Nonetheless,] GM adds, the Michigan decree does not bind the Bakers; it binds *Elwell* only. . . . [I]t is clear that issue preclusion principles, standing alone, cannot resolve the controversy GM presents.

Id.

191. *See id.* at 666 (citing *Martin v. Wilks*, 490 U.S. 755, 761-63 (1989)); *see also* RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, §§ 137-39 (setting forth the principle that the law of the forum controls evidentiary principles).

> cannot automatically transfer title to land in another State, similarly the Michigan decree cannot determine evidentiary issues in a *lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court.*[192]

Thus, despite the majority's resistance to the Bakers' use of due process language, as demonstrated during oral argument, the essence of the Bakers' argument appears to have been accepted; there is something fundamentally wrong with a judgment that attempts to affect, if not bind, the essential interests of nonparties, thereby placing the judgment outside the protection of full faith and credit.

The majority attempted to prevent mischaracterization of its holding, and to respond to the criticism of Justice Kennedy's concurring opinion, by denying it was recognizing a public policy exception to full faith and credit. "This conclusion creates no general exception to the full faith and credit command, and surely does not permit a State to refuse to honor a sister state judgment based on the forum's choice of law or policy preferences."[193]

Although it did not state so specifically, the majority appeared to assume that, based on its decision in *Matsushita*,[194] consent judgments are entitled to the same full faith and credit given to litigated judgments. The Bakers did not advocate that an exception to full faith and credit should be created for consent judgments, an understandable position, particularly given the modern history of expansion of preclusive effects given to judgments generally and the criticism of anything which "smells" like another public policy exception.[195] The Supreme Court did not ex-

---

192. *Baker*, 118 S. Ct. at 667 (emphasis added) (citations omitted).

193. *Id.* at 667.

> Justice Kennedy inexplicably reads into our decision a sweeping exception to full faith and credit based solely on "the integrity of Missouri's judicial processes." The Michigan judgment is not entitled to full faith and credit, we have endeavored to make plain, because it impermissibly interferes with Missouri's control of litigation *brought by parties who were not before the Michigan court.*

Id. at 667 n.12 (citations omitted).

194. 516 U.S. 367 (1996).

195. During oral argument of *Baker*, Chief Justice Rehnquist initiated the questioning by asking for a definition of consent decrees and Justice Ginsburg followed by making the observation that in this particular case, "nothing was ever actually litigated," thus eliminating the possibility of issue preclusion. Transcript at 3-6. Were these exchanges a signal that the justices were willing to deny or limit interjurisdictional enforcement of the Michigan consent decree because of its "consensual" nature? In an attempt to answer this question, the author of this article contacted Professor Tribe, counsel for the Bakers. He kindly and quickly responded in writing by electronic mail. Although explaining he did not have the time to study the transcript of oral argument in order to respond to my letter, he stated it was his recollection that the questions may have been an attempt to goad him

pressly address this issue, despite a provocative question by one justice during oral argument.[196] Nonetheless, it seems evident that the consensual nature of the order, in that it was written as a complete ban on testimony and was virtually rubber-stamped by the court, was a factor that influenced the Court's ruling. Justice Ginsburg, in describing the history of the Elwell-GM consent judgment, specifically noted the nonadversarial setting of the final order, including the "new" judge's role in merely signing the parties' stipulated injunction.[197]

V. IMPLICATIONS

In many ways, particularly with the benefit of hindsight, the *Baker* ruling appears straightforward. The Court simply refused to permit the full faith and credit command to be used in a manner that would turn a consent judgment into an evidentiary sword against nonparties. Obviously, the analysis was less than simple for the lower courts in *Baker*, and consent judgments have proven difficult for courts analyzing the impact on third parties in other contexts.[198]

---

into taking a weak position. He wrote,

> I recall . . . that the Chief Justice in particular was trying to goad me into making our position rest on the non-litigated nature of that judgment, with the obvious if unstated premise that, since all consent decrees are by definition non-litigated judgment, any argument that would deny otherwise applicable full faith and credit to a judgment simply because it was consensual would be radically inconsistent with the Court's jurisprudence and would wreck havoc with the law.

Electronic correspondence from Lawrence Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School (May 20, 1998) (on file with author). Thus, it appears that Professor Tribe personally rejects making a distinction in enforcement for nonlitigated decrees, and further, made a strategic decision during oral argument of the Bakers' case not to request limitations based on the "consensual" nature of the Michigan settlement-based decree. Professor Tribe's position seems particularly understandable given his strong support for civil rights, since it seems likely that he would usually favor broad enforcement of certain consent decrees, such as the decree negotiated by the black firefighters in *Martin v. Wilks*, 490 U.S. 755 (1989). *See also* discussion *supra* note 173.

196. An unidentified justice, possibly Justice Souter, inquired whether the enforcement answer would be different if the judgment was the result of a fully litigated claim rather than a settlement.

> What if the Michigan court had litigated the issue of privilege as between Elwell and General Motors . . . and had concluded that information about subject X was privileged, and [the court] made that determination and then said, . . . you can't disclose that, Mr. Elwell, anywhere, anytime. Is that [decision] entitled to full faith and credit when Elwell is called then as a witness in another jurisdiction?

Transcript at 25.

197. *See Baker*, 118 S. Ct. at 661-62 & n.1; *see supra* Part III.C (discussing jurisdictional preclusion).

198. *See, e.g.*, Prudential Ins. Co. v. Nelson, 11 F. Supp. 2d 572 (D.N.J. 1998) (discussing California, Florida, and New Jersey interests in determining privilege issues, and taking the lead as the court which issued the consent judgment to protect a corporation which

At Part III of this Article, six approaches to full faith and credit issues were identified, and at least four of these theories had substantial support in prior court decisions. Justice Ginsburg's decision, however, fashioned a different approach, which appears to merge individual due process and institutional concerns. This seventh approach to full faith and credit can be summarized as follows:

7. *Ginsburg's Ruling in Baker v. General Motors*: A distinction exists, for purposes of full faith and credit, between recognition and the mechanics of judgment enforcement, arising out of the historical power of all F-2 jurisdictions to control their own judicial proceedings. Therefore, F-2 courts may decline to enforce an F-1 order when two factors are present: (a) the F-1 judgment attempts to affect the course of F-2's control over its own litigation *and* (b) the F-1 judgment, if enforced, would affect the important interest of someone who was not a party to F-1.[199]

Questions about interjurisdictional enforcement, arising in recent cases such as *Martin v. Wilks*, *Matsushita*, and *Baker*, reflect surprisingly persistent confusion about the sources of any defenses or exceptions to full faith and credit. Justice Ginsburg's opinion appears to be an effort to organize some of the past decisions,[200] in which courts have refused to require interjurisdictional enforcement of judgments, into a coherent, single theory. As such, the *Baker* decision seems to articulate a national vision of a federalized system for the dispensing of justice, and thus the question becomes whether section 103 of the *Restatement (Second) of Conflict of Laws*, already captures this principle.

A. New Life for Section 103? Justice Ginsburg's Non-Roving Public Policy Exception

There has been a long debate among commentators about the correct-

---

had a strong interest in preventing its former attorney from testifying); Continental Cas. Co. v. Westerfield, 961 F. Supp. 1502 (D.N.M. 1997) (discussing nonenforcement of arguably collusive stipulated facts in consent judgment against nonparty insurers).

199. *See Baker*, 118 S. Ct. at 665-68; *see also, e.g.*, MOORE, *supra* note 149, § 130.02, at 5 (Current Developments Supp., Sept. 1998) (summarizing the *Baker* holding: "One state's judgment cannot reach beyond controversy resolved by that judgment to control proceedings brought in other states, by other parties, asserting claims merits of which rendering state has not considered.").

200. The three strands of cases that Ginsburg's decision treats as providing precedent include the right of F-2 forums not to enforce F-1 decrees regarding title to F-2 property, as in *Fall v. Eastin*, 215 U.S. 1 (1909), the right of F-2 forums to resist certain F-1 anti suit injunctions, as in *James v. Grand Trunk Western R.R. Co.*, 152 N.E.2d 858 (1958), and the right of an F-2 forum to award workers compensation benefits which supplement an administrative award in another state, as in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980) (plurality opinion).

ness of public policy exceptions to full faith and credit.[201] Sides have been chosen by writers who assign importance to a national goal of interstate enforcement of judgments and those who discount as imaginary the horrors of second-guessed rulings among the sister states. Those urging the need for a strong national policy of finality rely on *Fauntleroy v. Lum*.[202] In *Fauntleroy*, the Supreme Court applied the Full Faith and Credit Clause to require Mississippi to enforce the judgment of a Missouri court, despite the fact that this would require Mississippi to give effect to a debt arising out of a gambling transaction deemed illegal under Mississippi law: "[T]he judgment [of Missouri] cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law."[203]

The holding of *Fauntleroy* is reflected in section 117 of the *Restatement (Second) of Conflicts of Laws*:

> A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim.[204]

The comments to section 117 use the *Fauntleroy* case as an illustration of the principle rejecting local public policy as a proper basis for avoiding the full faith and credit command. Justice Ginsburg was correct in making the observation that the federal district court in *Baker* misread the Supreme Court's precedent in permitting the local concern for full discovery to be weighed against Michigan's interest in enforcement of its judgment.[205] As commentators have observed, "[t]he most troublesome use of public policy comes when it is employed as a cloak for the selection of local law to govern a transaction having important local contacts."[206] This parochial weighing or balancing of competing state interests was exactly the action the Supreme Court sought to avoid in deciding *Fauntleroy*.

However, section 103 of the *Restatement (Second) of Conflicts of Laws* articulates the possibility that an exception to full faith and credit exists that is subtle in its difference from section 117. The exception, perhaps unnecessarily vague in the form contained in the *Restatement*, appears to recognize a role for the Supreme Court in determining what concerns, in

---

201. *See, e.g.*, RICHMAN & REYNOLDS, *supra* note 105, at ch. 5; Reynolds, *supra* note 80, at 436-38.

202. 210 U.S. 230 (1908).

203. *Id.* at 237.

204. RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, § 117.

205. *See* Baker v. General Motors Corp., 118 S. Ct. 657, 664 (1998).

206. Paulsen & Sovern, *supra* note 181, at 1016.

a national system of jurisprudence, override a general policy in favor of full faith and credit for judgments:

> A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with [*] important interests of the sister State.[207]

Perhaps a more helpful statement of the exception would exist if the words "nationally recognized important interests of the sister States" were inserted beginning at the asterisk above and substituted for the balance of the original clause.

The genesis of this provision was Justice Stone's dissenting opinion in *Yarborough v. Yarborough*.[208] In that case, a father was a party to a Georgia judgment, in the form of a consent decree, settling all remaining issues with his wife arising out of their divorce. He had satisfied the judgment by payment of a specific sum in child support, or "alimony" as the term was used in the decree. The father asserted that his daughter's subsequent direct action for additional support, filed in the courts of her new domicile of South Carolina, was barred by the existence of the prior final order. In support of his position, he cited the doctrine of res judicata, as enforced in the interstate context by the Full Faith and Credit Clause.[209]

The majority accepted the father's full faith and credit argument, ruling that the father "has fulfilled the duty which he owes [the daughter] by the law of his domicile and the judgment of its court. Upon that judgment he is entitled to rely."[210] Thus, full faith and credit was held to apply "to an unalterable decree of alimony for a divorced wife. The clause applies, likewise, to an unalterable decree of alimony for a minor child."[211]

Justice Stone, however, thought the daughter was entitled to pursue her separate suit under the law of South Carolina, her new state of domicile.[212] Citing several cases in which full faith and credit was denied because of the important interests in separate adjudication which existed in

---

207. RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, § 103.

208. 290 U.S. 202 (1933).

209. *See id.* at 209-10.

210. *Id.* at 212.

211. *Id.* at 212-13.

212. *See id.* at 224-25 (Stone, J., dissenting). At the time of its decision in the daughter's suit, South Carolina recognized a specific obligation of a father, enforceable by a child's direct action, to provide support in the circumstances claimed by the daughter. *See id.* at 223-24 (Stone, J., dissenting).

what would now be described as "F-2" states, Justice Stone made this observation:

> Whatever may be said of the local interest which was deemed controlling in those cases in which this Court has denied to a state judgment the same force and effect outside the state as is given to it at home, it would not seem open to serious question that every state has an interest in securing the maintenance and support of minor children residing within its own territory so complete and so vital to the performance of its functions as a government, that no other state could set limits upon it.[213]

Thus, Justice Stone contended there would, on occasion, be a need for the Supreme Court to identify important interests of the states in controlling the outcome of their local disputes. Therefore, he believed in this case it was appropriate for South Carolina to award support for the care of its citizens, without regard to Georgia's interest in her citizens:

> The [majority's decision in *Yarborough*] extends the operation of the full faith and credit clause beyond its proper function of affording protection to the domestic interests of Georgia and makes it an instrument for encroachment by Georgia upon the domestic concerns of South Carolina.[214]

As the comments to section 103 of the *Restatement* emphasize, this exception "has an extremely narrow scope of application" for any other interpretation would permit the exception to swallow the rule.[215] The commentary further states that it is for the Supreme Court to determine the application of this rare exception, thus presumably restricting application to circumstances reflecting a national view of the interests at stake.[216]

Many commentators believe that the application of this exception applies, at most, to a few fact-bound cases arising in the context of domestic relations[217] and, perhaps, workers' compensation.[218] Most recently, section 103 appeared to find support in the plurality decision of *Thomas v. Washington Gas Light Co.*[219] In *Thomas*, an employer asserted that under the Full Faith and Credit Act, a Virginia Industrial Commission award of compensation was res judicata, barring the worker from making

213. *Id.* at 225 (J. Stone, dissenting).
214. *Id.* at 227 (J. Stone, dissenting).
215. RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, § 103 cmt. a.
216. *See id.* § 103, cmt. b.
217. *See* RICHMAN & REYNOLDS, supra note 105, § 114[b], at 353-54.
218. *See id.* § 114[c], at 354-55.
219. 448 U.S. 261 (1980).

a claim for supplemental benefits in the District of Columbia.[220] Attempting to resolve the conflicting decisions of *Magnolia Petroleum Co. v. Hunt*[221] and *Industrial Commission of Wisconsin v. McCartin*,[222] the four-member plurality opinion, authored by Justice Stevens, cited Justice Stone's dissent in *Yarborough* and held:

> We simply conclude that the substantial interests of the second State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause, as was implictly recognized at the time of *McCartin*. We therefore would hold that a State has no legitimate interest within the context of our federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its workmen's compensation law in the first instance. The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards.[223]

Exactly how to characterize the plurality decision in *Thomas v. Washington Gas Light Co.* has generated considerable attention, including some attempts to limit its precedential value to workers compensation cases.[224]

In *Baker v. General Motors*, however, Justice Ginsburg's decision seems to define more clearly the separation between prohibited public

---

220. *See id.* at 266.

221. 320 U.S. 430 (1943) (prohibiting a sister state's award of additional worker compensation).

222. 330 U.S. 622 (1947) (permitting a sister state's award of additional worker compensation).

223. *Thomas*, 448 U.S. at 285-86 (footnote omitted) (Stevens, J., plurality opinion).

224. *See, e.g.*, RICHMAN & REYNOLDS, *supra* note 105, § 114[c][3] & [4], at 356-59 (criticizing rationale of plurality opinion); Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 650 (1997) (citing *Thomas* as evidence that the question is open as to whether Congress can cut back on the amount of full faith and credit mandated by the Supreme Court); Rochelle Cooper Dreyfuss & Linda J. Silberman, *Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 RUTGERS L.J. 123, 148 n.120 (1996) (recognizing that *Thomas* has been severely criticized); Reynolds, *supra* note 80, at 446-47 (characterizing the plurality opinion as an "interest balancing" approach); Mark Strasser, *Judicial Good Faith and the* Baehr *Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 316 (1997) (citing *Thomas* for the principle that the Supreme Court wants rights recognized in a given state to be recognized nationally); Germaine Winnick Willett, Note, *Equality Under the Law or Annihilation of Marriage and Morals? The Same-Sex Marriage Debate*, 73 IND. L.J. 355, 378-79 (1997) (construing the plurality opinion as supporting the position that full faith and credit does not require one State to substitute for its own statute an analogous, yet conflicting, statute).

policy concerns under section 117 and acceptable public policy concerns under section 103. Her decision characterized the Michigan state consent judgment as an attempt to reach beyond the Elwell/GM dispute and "to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered."[225] An exception to full faith and credit based on the F-1 judgment's attempt to control F-2 proceedings is different than a local public policy exception based on F-2's rejection of an F-1 ruling based on F-2's substantive law. By recognizing a national interest in the integrity of all states and all courts to decide their own evidentiary questions, subject to the *guidance* of precedent rather than the *mandate* of full faith and credit, the Supreme Court appears to have demonstrated an appropriate, modern application for section 103.[226] Regardless of commentary which is critical of section 103, it now appears evident that the Supreme Court is willing to identify a national vision of overriding, legitimate state interests, and to protect such interests from being impaired by mechanical application of full faith and credit.

Whether it was the intention of Justice Ginsburg to craft a decision that would cause a majority of the Court to utilize section 103 is, however, less clear.[227] The majority decision cites the plurality opinion in *Thomas v. Washington Gas Light Co.*, for a key proposition which is consistent with section 103:

> In sum, Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside Michigan's governance. Recognition, under full faith and credit, is owed to dispositions Michigan has authority to order. But a Michigan decree cannot command obedience elsewhere on a matter the Michigan court lacks

225. Baker v. General Motors Corp., 118 S. Ct. 657, 666 (1998).

226. The comments to Restatement section 103 indicate the provision is not applicable to mandates or prohibitions created by final equitable orders.

> The rule of this Section is not concerned with the enforcement of sister State judgments that order the doing of an act other than the payment of money or that enjoin the doing of an act. As stated in § 102, the enforcement of such [equitable relief] may not be required by full faith and credit.

RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 23, § 103 cmt. a. However, Justice Ginsburg, in refusing to base the decision in *Baker* on the injunctive nature of the Michigan state court order, appears to have resolved this question about section 102. *See Baker*, 118 S. Ct. at 667-68.

227. The Bakers did not urge application of section 103, merely noting its distinction from section 117's prohibition on local public policy exceptions. Petitioner's Brief, *supra* note 36, at 24 n.17.

authority to resolve.[228]

However, the majority does not cite either section 103 or Justice Stone's dissent in *Yarborough*, and it ignores the substantial commentary which criticizes application of section 103. Thus, as Justice Kennedy suggests,[229] the precedent for the majority's refusal to require the Missouri court to enforce the Michigan order is still somewhat vague and the application to future cases uncertain.

One can anticipate that, consistent with Justice Kennedy's concern about the implications of the majority's approach to full faith and credit, the majority decision will be criticized for opening the doors to a flood of policy-based arguments that could weaken the function of full faith and credit. As a practical matter, given the strong, cautionary tone of the majority decision, this result appears unlikely. But in the final analysis, principles of preclusion, including full faith and credit, are based on public policy; when preclusion is misapplied, it is not surprising that public policy gives rise to limitations.[230]

Courts and counsel attempting to apply *Baker v. General Motors* must address the further concern of Justice Kennedy that it was unnecessary for the majority to create or recognize any exception to full faith and credit. Therefore, it is necessary to re-examine the "first step" analysis traditionally employed by the Supreme Court in approaching the application of full faith and credit to judgments.

B. Is Justice Kennedy Right? No Claim Preclusion + No Issue Preclusion = No Full Faith and Credit Concern

Justice Kennedy expressed concern that the majority had overlooked a well-settled approach to full faith and credit, which required the Missouri court, and all other courts faced with the prospect of affording preclusion to Michigan's consent judgment, to give it only such credit as would the

228. *Baker*, 118 S. Ct. at 667-68 (citing Thomas v. Washington Gas Light Co., 448 U.S. 261, 282-83 (1980)).

229. *See id.* at 669-70 (Kennedy, J., concurring).

230. Compare the commentary by Professors Paulsen and Sovern on the application of public policy to choice of law, wherein they observe that "textwriters, language in the cases, and the *Restatement* agree: the 'normal' operation of choice of law rules is subject to a 'public policy' limitation," followed by their caution that the "principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws." Paulsen & Sovern, *supra* note 181, at 969, 1016; *see* Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) (enforcing doctrine of res judicata and noting it serves a vital public interest beyond the local concerns of a particular case).

Michigan court.[231] He believed the majority's articulation of a distinction between recognition and enforcement was "problematic" and potentially created new theories by which some may seek to avoid final judgments.[232]

Justice Kennedy's first step approach to analysis is supported by multiple decisions of the Supreme Court[233] and, in particular, by Justice Ginsburg's own approach to analysis of full faith and credit issues in *Matsushita*: "I would not endeavor, as the Court does, to speak the first word on the content of Delaware preclusion law. Instead, I would follow our standard practice of remitting that issue for decision, in the first instance, by the lower federal courts."[234]

Justice Kennedy addressed the Michigan law on preclusive effects as to nonparties, despite his apparent belief that the majority, the parties, and the Eighth Circuit had overlooked this argument.[235] The concurring opinion did not address the Michigan law which declines to imply issue preclusive effects arising from consent judgments. In fact, both arguments were made in the Bakers' reply brief, though not in a prominent fashion.[236] The Michigan law on consent judgments further demonstrates the relevance of a "first step" analysis to determine the scope of preclusion as to parties and issues recognized by the rendering court.

In *American Mutual Liability Insurance Co. v. Michigan Mutual Liability Insurance Co.*,[237] a declaratory judgment action was filed regarding the proper source of insurance to cover damages sustained by a trucking company's driver who was injured while assisting in operations at a paper company. At issue were the preclusive effects, if any, from a consent decree used to settle the driver's tort action against the paper company on the question of which company was the "employer" of the driver for

231. *See Baker*, 118 S. Ct. at 668-69 (Kennedy, J., concurring). "In my view the case is controlled by well-settled full faith and credit principles which render the majority's extended analysis unnecessary and, with all due respect, problematic in some degree." *Id.*

232. *See id.* at 668-69. "My concern is that the majority," having stated the principle which forbids a second State from questioning a judgment because of disagreement with the holding, "proceeds to disregard it by announcing two broad exceptions. . . . As employed to resolve this case, . . . the exceptions to full faith and credit have a potential for disrupting judgments, and this ought to give us considerable pause." *Id.* at 669.

233. *See supra* note 129 (citing cases in which state law regarding preclusion was considered).

234. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part).

235. *See Baker*, 118 S. Ct. at 671 (Kennedy, J., concurring) ("Here the Court of Appeals and both parties in their arguments before our Court seemed to embrace the assumption that Michigan would apply the full force of its judgment to the Bakers.").

236. *See* Petitioner's Reply Brief, *supra* note 72, at 19.

237. 235 N.W.2d 769 (Mich. Ct. App. 1975).

purposes of insurance coverage. Although the court assumed there was sufficient mutuality among the parties for estoppel to apply, the court nonetheless held that the consent decree had no collateral estoppel effect because no factual issues were "actually adjudicated," and because the judge's action in signing the final order was merely "ministerial" in nature.[238] "It follows that because the issues involved in the settled case were not actually adjudicated, one of the prerequisites to giving a judgment collateral estoppel effect is not satisfied. . . . Nothing is adjudicated between two parties to a consent judgment."[239] In declining to give collateral estoppel effect to the consent judgment, the court contrasted the need to reduce "instances of costly litigation" with a rule that would provide "drastic consequences for settlements."[240]

> Because the application of the doctrine of collateral estoppel to consent judgments will in many cases be unforeseeable, consent judgments may become less desirable, thus impeding and embarrassing the settlement process. As Professor James puts it: "Any rule which tends to assure contest rather than compromise . . . probably tends, on balance, to increase rather than decrease litigation."[241]

Nonetheless, although Michigan courts will not infer issue preclusion from a consent judgment, they will recognize a broader preclusive effect expressly created by the parties' agreement. The court noted that, "if the parties intend that the settlement is to bind them on certain issues of fact, and if this intention is reflected in the consent judgment, collateral estoppel will apply. The consent judgment involved here does not go so far."[242] Thus, in the absence of specific factual stipulations incorporated into the consent judgment, such a judgment creates no inference of issue preclusion for the original parties under Michigan law.

Michigan courts have found it easy to extend this rule to prohibit the parties from using consent judgments in an attempt to affect persons who were not a party to the agreement. In *Peterson v. City of Lapeer*,[243] a consent judgment between the city and a group of landowners, which determined the residential character of a section of real estate, was held to have no effect on a nonparty-owner's commercial use of property in-

238. *See id.* at 776.

239. *Id.*

240. *Id.* at 776-77.

241. *Id.* at 777 (footnotes omitted) (quoting Fleming James, Jr., *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 185 (1959)).

242. *Id.* at 776 n.13 (citation omitted).

243. 307 N.W.2d 744 (Mich. Ct. App. 1981).

cluded within the stipulation. The Michigan Court of Appeals noted, "[t]he consent judgment entered into between the City of Lapeer and defendants is not binding on these plaintiffs or upon the trial court."[244] This case suggests that stipulations of the parties contained in a decree are binding only on the parties. Thus, Justice Kennedy's concern that determination of Michigan law is an important first step in approaching the application of full faith and credit seems justified on more than one basis.

Justice Ginsburg responded to Justice Kennedy's concern by noting that Michigan's common law preclusion principles fail to resolve GM's contention that there is no intent to bind the Bakers and similar claimants, but only to bind Elwell to his agreement and the dictates of a judgment.[245] It is true that the Michigan cases cited by Justice Kennedy,[246] and the intermediate court of appeal cases from Michigan regarding the effects of consent judgments,[247] do not address the precise issue of whether persons who are "merely affected" by an F-1 judgment may avoid those effects by requiring the F-1 judgment to satisfy necessary elements for claim and issue preclusion.

On the other hand, a careful reading of the injunctive relief and consent judgment cases from Michigan supports a conclusion that Michigan courts would not be persuaded by GM's characterization of the Elwell/GM agreement. The Michigan courts, in resisting the modern trends and continuing to require mutuality and "actual litigation" of issues as prerequisites for estoppel, clearly are sensitive to the potential for the interests of nonparties that may be compromised by wide-ranging consensual or litigated judgments. At a minimum, if there is to be fidelity to the Supreme Court's jurisprudence requiring the F-2 court to examine the F-1 state's preclusion law, it would seem appropriate—if frustrating to the Bakers—for the Supreme Court to have remanded the *Baker* case for determination by the federal district court of the impact of Michigan preclusion law.[248]

---

244. *Id.* at 748; *see* Berar Enters., Inc. v. Harmon, 300 N.W.2d 519, 523 (Mich. Ct. App. 1980) (holding a consent judgment not binding "where the party against whom [it] was sought to be enforced did not agree to its entry").

245. *See* Baker v. General Motors Corp., 118 S. Ct. 657, 666 n.11 (1998).

246. *See id.* at 671-72 (Kennedy, J., concurring).

247. *See* Peterson v. City of Lapeer, 307 N.W.2d 744 (Mich. Ct. App. 1981); American Mut. Liab. Ins. Co. v. Michigan Mut. Liab. Ins. Co., 235 N.W.2d 769, 777 (Mich. Ct. App. 1975); *see also supra* notes 237-44 and accompanying text (discussing the preclusive effect that the Michigan Court of Appeals granted consent judgments).

248. *See, e.g.*, Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part) (arguing that the remand should be for the purpose of allowing the lower court to address Delaware preclusion law); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 87 (1984) (remanding so that the federal

Another formulation of Justice Kennedy's first step approach seems to present an even easier answer to the *Baker* case. By summarizing Justice Kennedy's first step analysis with an equation, No Claim Preclusion + No Issue Preclusion = No Full Faith and Credit, this Article's intention is to emphasize the importance of F-1's law of preclusion. However, the equation also embodies the essence of the relationship between *all* common law preclusion principles and full faith and credit. If the assertion of the F-1 judgment in F-2 creates no opportunity to end the litigation through claim or issue preclusion, because, for example, the F-2 parties are not the same as the F-1 parties, there simply is no full faith and credit question. Full faith and credit has never been used as a means to mandate controlling precedent from jurisdiction to jurisdiction.[249]

It seems reasonable to conclude, however, that by reaching the constitutional question on the scope of full faith and credit where "mere effects" of a judgment are asserted, the Supreme Court is signaling the important, constitutional nature of its limitation on full faith and credit. Although it does not use the phrase "due process" as the source of the limitation on full faith and credit for judgments, the majority decision in *Baker v. General Motors* nonetheless identifies an analogous limitation on interjurisdictional enforcement of judgments. As discussed in Part V.C, below, Justice Ginsburg's limitation on full faith and credit functions in much the same manner as does the due process limitation on res judicata seen in *Richards v. Jefferson County*.[250]

C. The Unaddressed Question: Why Not Due Process?

In its opinion, the Supreme Court seems to ignore the central due process argument of the Bakers.[251] Yet, the due process challenge appeared

---

district court could apply Ohio preclusion law).

249. A more disturbing possibility would be that the majority, by addressing General Motors's contention, envisioned instances where full faith and credit would require "enforcement" of the mere effects of a judgment against nonparties; for example, if such effects were deemed minimal. Such a conclusion, however, appears inconsistent with the distinction the Court made between full faith and credit for common law and judgments, and would appear to confuse common law preclusion by judgment with the common law doctrine of *stare decisis*. *See supra* notes 48-151 and accompanying text (addressing the Court's treatment of consent and litigated judgments for preclusion purposes). In this respect, Justice Kennedy seems justified in his concern that there is no reason to reach the full faith and credit issue if the rendering court would not assign claim or issue preclusion to the judgment in question. "Mere effects" generated by a prior decision do not appear to require enforcement under the full faith and credit command, regardless of their benign nature.

250. 517 U.S. 793 (1996); *see infra* Part V.C (discussing case in detail).

251. *See supra* Part IV (discussing the functioning of full faith and credit principles, as understood by Justice Ginsberg).

to have been invited by the reasoning of two recent cases addressing the effects of consent judgments: the majority decision in *Martin v. Wilks*,[252] and Justice Ginsburg's own partial concurring opinion in *Matsushita Electric Industrial Co. v. Epstein*.[253] In *Wilks*, the Supreme Court held that white firefighters were not precluded from asserting the discriminatory impact of their employer's decisions made in reliance on a consent decree that had settled a prior discrimination suit by black firefighters.[254] With this decision, the Supreme Court put an end to a judicially fashioned "collateral attack bar" relied on by the majority of federal circuits as the basis to restrict review of consent decrees in public interest litigation.[255] Although it did not use the phrase "due process" or cite a specific constitutional amendment,[256] the majority made the following observation:

> All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.[257]

In *Wilks*, the Court contrasted the consent decree at issue with other

---

252. 490 U.S. 755, 758 (1989).

253. 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part); *see also* Blonder-Tongue Labs. v. University of Illinois Found., 402 U.S. 313, 329 (1971) (holding that due process prohibits estopping litigants from going forward); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 108-12 (1969) (holding a company was not bound by a judgment resulting from litigation to which the company was not a party).

254. The holding in *Martin v. Wilks*, 490 U.S. 755 (1989), has been superseded by legislation amending 42 U.S.C. § 2000e-2 to restrict "collateral" attack on consent decrees in employment discrimination cases. *See* 42 U.S.C. § 2000e-2(n) (1994).

255. *See generally* John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507 (1994) (analyzing the impact of the common law collateral attack bar in Title VII cases); Susan B. Dorfman, Comment, *Mandatory Consent: Binding Unrepresented Third Parties Through Consent Decrees*, 78 MARQ. L. REV. 153, 156-60 (1994) (addressing the problems inherent in trying to enforce consent decrees against third parties and providing proposed solutions).

256. The majority opinion was authored by Chief Justice Rehnquist. *See Wilks*, 490 U.S. at 758. Compare Chief Justice Rehnquist's remarks during oral argument in *Baker*, discussed *supra* at note 195.

257. *Wilks*, 490 U.S. at 761-62 (citations omitted) (quoting Hansbury v. Lee, 311 U.S. 32, 40 (1940); 18 CHARLES A. WRIGHT, ET AL. FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)).

"special remedial scheme[s]" which "expressly [foreclose] successive litigation by nonlitigants, as for example in bankruptcy or probate," noting that in such instances "legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process."[258]

By comparison, in *Matsushita*, a Delaware state court judgment that had been used to settle a shareholders' suit based on state and federal laws was held to act as a bar to a separate federal suit by another group of shareholders.[259] While it may be tempting to read the *Matsushita* result as a declaration that consent judgments will be given the same broad full faith and credit as litigated judgments, a more cautious reading suggests the Court's reason for giving preclusive effect to the state consent judgment depended heavily on the judicial supervision of the class action certification process.[260] The Court viewed the class certification review conducted by the lower federal court as providing appropriate protections to "absent" shareholders who thus were held to be barred from separate suit by the first outcome.[261] The Delaware court's role in certifying the class for settlement was far more than a rubber stamp on a contract. Justice Ginsburg, writing separately, specifically cautioned against reading the majority's willingness to give preclusive effects to the state court judgment too broadly: "A state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause."[262]

In truth, however, the Supreme Court did not so much ignore the due process argument in *Baker* as it side-stepped it. During oral argument, it became apparent early that the Court was not disposed to adopt the due process analysis urged by the Bakers in their briefs. Justice Kennedy inquired of Professor Tribe,

> If we were to rule in your favor and cite the Full Faith and Credit Clause, would we also have to talk about due process, or would we say that the Full Faith and Credit Clause is complementary to the basic principles of the law of judgments, and that Baker is just not bound under standard principles of the laws of

258. *Wilks*, 490 U.S. at 762 n.2.

259. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996).

260. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (Ginsburg, J.) (holding settlement to be a relevant factor in reviewing class certification under Rule 23, finding federal courts may not ignore Rule 23 and adopt their own standard of approval based on "fairness" of settlements, and reversing class certification because of failure to satisfy criteria of Rule 23).

261. *See Matsushita*, 516 U.S. at 377-78.

262. *Id.* at 388 (Ginsburg, J., concurring in part and dissenting in part).

judgment?[263]

In an exchange a few moments later, Chief Justice Rehnquist followed with the observation that "I don't think you'll find much disposition on the Court to enlarge on [the due process implications of] *Logan v. Zimmerman.*"[264] Laurence Tribe began a pragmatic retreat from the due process focus of the brief, a decision which was reinforced by the observation of Justice Ginsburg: "Mr. Tribe, I thought . . . you were concentrating on preclusion principles rather than a due process personal right."[265]

On one level, *Logan v. Zimmerman Brush Co.*[266] appears highly relevant to the Bakers' concerns. In 1982, the Supreme Court recognized that a "cause of action is a species of property" and that a party's right to pursue such an action is subject to the protections of the due process clause of the Fourteenth Amendment.[267]

> The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. . . . Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."[268]

At issue in *Zimmerman* was a disabled employee's right to have a state administrative grievance hearing when, through no fault of the employee, the state failed to schedule the hearing within a 120-day statutory window. In the lead opinion, written by Justice Blackmun, the Court concluded that a "state-created right to redress discrimination" was a protected property right.[269]

In a separate opinion concurring in the judgment of *Zimmerman*, Justice Powell, joined by Justice Rehnquist, admonished the majority, citing the dangers of resolving the case on due process grounds.[270] It may be

263. *Id.* at 14.

264. *Id.* at 16 (making reference to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)).

265. Transcript, *supra* note 2, at 19-20.

266. 455 U.S. 422 (1982).

267. *See id.* at 428 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

268. *Id.* at 429-30 (quoting Boddie v. Connecticut, 401 U.S. 371, 380 (1971)).

269. *Id.* at 431.

270. *See id.* at 443 n.* (Powell, J., concurring).

tempting to explain the Supreme Court's unwillingness to extend *Zimmerman* as a reflection of the conservative nature of the more recent Supreme Court.[271]

Blaming the change on the political composition of the Court, however, is an overly simplistic answer. Indeed, in 1996, the Supreme Court was unanimous in holding that due process was the source of the limitation on a court's ability to use a judgment to bind new challengers.[272]

In *Richards v. Jefferson County*,[273] the Court found that application of res judicata, arising from a prior court decision on the constitutionality of a county occupation tax, was unconstitutional when applied to "new" challengers. The Court cited the same line of due process/jurisdictional cases used by Justice Blackmun in deciding *Zimmerman*.[274]

> State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes. We have long held, however, that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is "fundamental in character."
>
> The limits on a state court's power to develop estoppel rules reflect the general consensus "'in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those

---

> It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinions in these areas are often criticized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved. Yet I suppose we would all agree—at least in theory—that unnecessarily broad statements of doctrine frequently do more to confuse than to clarify our jurisprudence.

Id. (Powell, J., concurring).

271. *See* Ruth Bader Ginsburg, *Speaking In A Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) ("Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable."). *See generally* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984) (tracking the development of the "Burger Court's" positivist theory of property rights).

272. *See* Richards v. Jefferson County, 517 U.S. 793, 802 (1996).

273. 517 U.S. 793 (1996).

274. *See id.* at 798-805 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hansberry v. Lee, 311 U.S. 32 (1940)).

proceedings."[275]

Interestingly, aspects of this same analysis appear in the majority opinion of *Baker v. General Motors*.[276] The distinction between the due process analytical approaches used in *Zimmerman* and *Richards* and the section 103 approach of Ginsburg's majority in *Baker v. General Motors* appears to be the Court's response to the interest at risk. In *Zimmerman*, the state denied a hearing on employment rights, which had been created by statutory process; in *Richards*, the hearing was also employment-related, and was for the purpose of determining the constitutionality of an occupancy tax imposed on private but not public workers. As such, both suits fell within fairly well-settled areas of protected "fundamental" property rights. Apparently, the Supreme Court was unwilling, or Justice Ginsburg could not command enough votes, to use the occasion of *Baker v. General Motors* to imply, much less declare, that the plaintiffs' interest in calling a specific witness at deposition or trial was the equivalent of a fundamental, individual right. As one commentator has observed,

> [t]he difficulty in whistleblower proceedings is that unlike the petitioner in *Logan*, a whistleblower is not denied access to the cause of action itself. Therefore, if the cause of action is the property interest, there may be no deprivation in a whistleblower case because the suit may proceed without the subpoena power.[277]

Thus, the majority decision in *Baker v. General Motors* should be seen as important both for the fact that it *does* recognize a policy limitation, apparently based on the Constitution , on the application of full faith and credit to enforce "meddling" judgments, and because the justices *did not* choose to identify due process as the source of this constitutional limitation. Presumably, there may be some judgments that have permissible "effects" on third persons and which must be enforced under full faith and credit because the judgments neither impair fundamental individual rights, nor interfere with important national policy interests, such as the nation-wide obligation of courts to determine individual claims. *Matsushita* may be an example of the case in the middle, where the absent persons' interests are viewed as protected by the class certification process.[278] Many consent judgments, however, receive little, if any, judicial consid-

275. *Richards*, 517 U.S. at 797-98 (citations and footnote omitted).

276. *See* Baker v. General Motors Corp. 118 S. Ct. 657, 666 n.11 (1998).

277. Stephen E. Smith, *Due Process and the Subpoena Power in Federal Environmental, Health, and Safety Whistleblower Proceedings*, 32 U.S.F. L. REV. 533, 540 (1998).

278. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 377-78 (1996).

eration of the merits and offer ripe opportunities for F-1 parties to seek advantage in F-2 suits.

VI. CONCLUSION: LIMITATIONS EXIST ON INTERJURISDICTIONAL "EFFECTS" OF JUDGMENTS, ESPECIALLY CONSENT JUDGMENTS

In attempting to resolve the various approaches to full faith and credit, one conclusion is paramount. The recent characterization of full faith and credit as the "iron law," which appears to have influenced the positions of GM and the Eighth Circuit, and which is helpful in describing the credit generally given to judgments, should not be treated as an excuse for oversimplification. As demonstrated by the Court in *Baker v. General Motors*, the full faith and credit command is not a mechanical rule requiring the courts to "enforce" a judgment while ignoring the implications of that judgment for specific individuals, or for the judicial system.

Given the recent frequency with which difficult interjurisdictional enforcement questions have arisen in the context of consent judgments,[279] requiring the Court to craft carefully worded limitations on full faith and credit, perhaps there is need to reconsider the underlying assumption that full faith and credit should apply equally to litigated and consensual final decrees. Consent judgments are useful devices, but, as in other instances in which there is a lack of "judicial" fact finding and legal evaluation,[280] perhaps there is good reason not to elevate such decrees to the status of "judicial proceedings" that are presumptively entitled to interjurisdictional enforcement. Eventually, the Supreme Court may be required to reconsider its assumptions about full faith and credit for consent decrees.[281] In the meantime, as a factual, if not legal matter, the appropriate maxim for litigation attorneys contemplating settlement by consent judgment should be: *caveat emptor*, buyer beware.

279. *See Baker*, 118 S. Ct. at 657; *Matsushita*, 516 U.S. at 367; Martin v. Wilks, 490 U.S. 755 (1989).

280. *See supra* note 172 (discussing unconfirmed arbitration awards).

281. *See, e.g.*, Prudential Ins. Co. of America v. Nelson, 11 F. Supp. 2d 572, 579-80 (D.N.J. 1998) (declining to follow *Baker* on the ground that the consent decree involved in *Nelson* applied only to privileged information; therefore, third parties would not have had access to it in the first place).