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A Clash of Two Courts: Baker, Full Faith and Credit, and Montana's Refusal to Recognize a North Dakota Declaratory Judgment

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A CLASH OF TWO COURTS: *BAKER*, FULL FAITH AND CREDIT, AND MONTANA’S REFUSAL TO RECOGNIZE A NORTH DAKOTA DECLARATORY JUDGMENT

JEFFREY WALD*

ABSTRACT

The Full Faith and Credit Clause of the United States Constitution is one of the most important, but least understood, constitutional clauses. Together with the principles of *res judicata*, the Full Faith and Credit Clause generally ensures that a final judgment in one state has binding and preclusive effect all over the country. In *Baker v. General Motors Corp.*, decided in 1998, the Supreme Court threw a wrinkle in Full Faith and Credit Clause jurisprudence when the majority held that a state need not enforce a judgment of another state when the judgment “interfere[s] with litigation over which the ordering State had no authority.” This broad statement questioned the Court’s longstanding conclusion that there is no public policy exception to affording full faith and credit to another state’s judgment. This article explores the *Baker* holding in the context of two competing lawsuits which culminated in contradictory decisions of the North Dakota and Montana Supreme Courts. The article concludes that the Montana Supreme Court erred when it refused to give preclusive effect to a North Dakota declaratory judgment. Because *Baker* is overbroad and confusing, the Court should clarify its holding the next opportunity that arises in order to prevent future courts from refusing to give preclusive effect to another state’s judgment.

I.	INTRODUCTION	144
II.	RES JUDICATA.....	145
III.	FULL FAITH AND CREDIT.....	147
IV.	DECLARATORY JUDGMENTS	152
V.	WAMSLEY I AND WAMSLEY II.....	154

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VI. CONCLUSION..... 161

I. INTRODUCTION

Mention the term “res judicata” to an ordinary third-year law student, and you are likely to experience plenty of glazed eyes and head scratching. The student may be able to point back to his first-year Civil Procedure class as the source of his vague recollection that res judicata is important. If you mention the term “full faith and credit” to a third-year law student, you are almost certain to get a blank stare. The Full Faith and Credit Clause of the United States Constitution typically does not find its way into first-year constitutional law courses. Unless the student took a course on conflicts of law, it is likely he has no concept what the Full Faith and Credit Clause says, and it is even less likely he knows what it means.

It is troublesome that more attorneys do not graduate law school with a deeper understanding of res judicata and full faith and credit, because they are deeply important legal concepts that have practical litigation value.¹ This article seeks to provide: (1) a brief overview of res judicata, particularly the subcategories of issue and claim preclusion; (2) a foundational understanding of the Full Faith and Credit Clause and the United States Supreme Court’s most recent interpretation of the clause in *Baker v. General Motors Corp.*; and (3) a description of declaratory judgments and their preclusive effect in other litigation. Using the framework of the discussion of res judicata, full faith and credit, and declaratory judgments, I critically evaluate two dueling cases in the North Dakota and Montana Supreme Courts.² In *Wamsley II*, the Montana Supreme Court refused to enforce a North Dakota declaratory judgment, largely relying on a supposed exception to the Full Faith and Credit Clause confusingly decided in *Baker*. I argue that the Montana Supreme Court took *Baker* beyond its breaking point.³ The decision in *Wamsley II* proves that Justice Kennedy was correct in his concurrence in *Baker* that the majority’s sloppy reasoning would provide later courts with an opportunity to enlarge the exceptions to full faith and credit.

1. Not to mention pecuniary consequences. Full faith and credit was worth \$400,000 to Nodak Mutual in its dispute with the Wamsley heirs. This dispute will be discussed in great depth below.

2. Nodak Mut. Ins. Co. v. Wamsley (hereinafter “*Wamsley I*”), 2004 ND 174, 687 N.W.2d 226; Wamsley v. Nodak Mut. Ins. Co. (hereinafter “*Wamsley II*”), 2008 MT 56, 341 Mont. 467, 178 P.3d 102.

3. One of the reasons for my interest in the subject matter of this article is that I am a native North Dakotan.

II. RES JUDICATA

The term “res judicata” literally means, “a thing adjudicated.”⁴ Unfortunately, this rather simple definition does not express much, if anything, about the great many contours⁵ res judicata has in practice.⁶ While res judicata encompasses many challenging and scholarly sub-issues, such as offensive non-mutual collateral estoppel,⁷ for purposes of this article, I will only be discussing res judicata in terms of claim preclusion and issue preclusion.

Claim preclusion precludes a party from re-litigating a claim that has already been decided by a valid and final judgment.⁸ This is because “[t]he judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal.”⁹ A simple example illustrates how claim preclusion typically works.¹⁰ Assume there is a car accident (which we shall call “the accident”), involving Driver A and Driver B. Driver A sues Driver B in state court for damages allegedly arising out of the accident. After scores of depositions, interrogatories, and the like, the court issues a valid and final judgment for Driver A that includes an award of damages. Driver A now has a new claim on the judgment, meaning she can enforce the judgment in the rendering court or another court, but the final judgment terminates Driver A’s ability to later sue Driver B under the same claim. Similarly, a valid and final judgment from the court that Driver B is not liable for the alleged damages bars Driver A from pursuing another action against Driver B on the same claim.¹¹

4 A DICTIONARY OF MODERN LEGAL USAGE 763 (2d ed. 1995).

5. One leading scholar has written “[t]he simplistic statement of *res judicata* is so devoid of objective standards that any attempt to apply the statement to a given set of facts poses great difficulties.” ALLAN D. VESTAL, *RES JUDICATA/PRECLUSION* 13 (1969).

6. A more helpful starting point is to think of res judicata as “specif[ying] the effect that any adjudication has on all subsequent litigation.” ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 3 (2001).

7. Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 76 (1988) (describing offensive non-mutual collateral estoppel as a plaintiff’s ability to use a prior judgment against a defendant as preclusive, even if the plaintiff was not a party in the prior lawsuit).

8. CASAD & CLERMONT, *supra* note 6, at 11.

9. 50 C.J.S. *Judgments* § 926 (2009). *See also* VESTAL, *supra* note 5, at 43 (“Res judicata, in the sense of claim preclusion, exists when a litigant has brought an action, an adjudication has occurred, and he is foreclosed from further litigation on the claim.”).

10. The following example is borrowed, with gratitude, from David L. Shapiro, a leading Civil Procedure scholar at Harvard Law School. *See* DAVID L. SHAPIRO, *CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS* 22-23, 32-33 (2001).

11. SHAPIRO, *supra* note 10, at 32-33. Shapiro relies on the RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982) (hereinafter RSJ) for the premise that:

Issue preclusion, on the other hand, precludes either party from subsequently litigating any issue of fact or law that was actually litigated and determined in the initial action “if the determination was essential to a valid and final judgment.”¹² Put slightly differently:

[a]ny right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein, and cannot again be litigated between the parties and privies . . . whether or not the claim or demand, purpose, or subject matter of the two suits is the same.¹³

Returning to the hypothetical involving Driver A and Driver B, suppose Driver B pleads in his answer that Driver A was contributorily negligent, thus precluding Driver A from recovering some or all of her damages. The court rules that Driver A was in fact not negligent. Later, Driver B sues Driver A for injuries that Driver B sustained in the same car accident, alleging that Driver A was negligent. Since this issue was already litigated and decided, Driver B is precluded from re-litigating the issue in the second action.¹⁴

To paraphrase John the Apostle, there are countless other things that could be written about *res judicata*, and if they were written, the world itself might not be able to contain the pages.¹⁵ For purposes of this article, however, it is sufficient to understand the basic role of claim preclusion and issue preclusion in subsequent litigation. In summary, claim preclusion precludes a party from re-litigating a claim that has already been decided by a valid and final judgment, and issue preclusion precludes either party from subsequently litigating any issue of fact or law which has actually been litigated, determined, and was essential to a valid and final judgment.

[a] valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent: (1) a judgment for the plaintiff merges the plaintiff's claim in the judgment and normally gives him a new claim on the judgment; and (2) a judgment for the defendant operates to bar a second action on the same claim.

Id. In the example regarding Driver A and Driver B, if Plaintiff A wins, then (1) takes effect; if Defendant B wins, then (2) takes effect.

12. CASAD & CLERMONT, *supra* note 6, at 11.

13. 50 C.J.S. *Judgments* § 926 (2009). *See also* RSJ § 17(3): “A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment[.]”

14. CASAD & CLERMONT, *supra* note 6, at 115. *See also* SHAPIRO, *supra* note 10, at 49.

15. *John* 21:25 (English Standard Version) (“Now there are also many other things that Jesus did. Were every one of them to be written, I suppose that the world itself could not contain the books that would be written.”).

III. FULL FAITH AND CREDIT

The Full Faith and Credit Clause has been called by one former Associate Justice of the United States Supreme Court the “lawyer’s clause” of the Constitution.¹⁶ Full faith and credit has two components: (1) the constitutional clause, and (2) the federal statutes implemented pursuant to the clause. The Full Faith and Credit Clause provides: “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other state. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”¹⁷ Congress has used its power to enforce the Full Faith and Credit Clause on four occasions.¹⁸ Of greatest importance to this article is Congress’ first use of its enforcement power, now codified as 28 U.S.C. § 1738, which states in pertinent part:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.¹⁹

The Full Faith and Credit Clause, together with 28 U.S.C. § 1738, essentially ensures that the principles of res judicata apply across state lines.²⁰ Thus, once a final and properly authenticated judgment from state

16. ROBERT H. JACKSON, *FULL FAITH AND CREDIT: THE LAWYER'S CLAUSE OF THE CONSTITUTION* 3 (1945). Justice Jackson thought this because the clause is “concerned with the techniques of the law,” and in every day practice, lawyers are deeply concerned with technique. *Id.* at 4.

17. U.S. CONST. art. IV, § 1.

18. William L. Reynolds, *The Story of the Full Faith and Credit Clause*, 41 MD. B.J. 34, 39 (2008). Of current political and social interest is the most recent use by Congress to enforce the Full Faith and Credit Clause by passing the Defense of Marriage Act (“DOMA”), 28 U.S.C. § 1738C. The Supreme Court recently struck down § 3 of DOMA, which defined “marriage,” for purposes of federal law, as a legal union between one man and one woman. *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013). The Court held that § 3 of DOMA violated the Fifth Amendment rights of individuals who are joined in lawful same-sex marriages. *Id.* The Court did not decide whether § 2 of DOMA, which authorizes the states to refuse to give effect to same-sex marriages celebrated in another state, is constitutional. But it is only a matter of time before the Court does decide this issue. All this goes to show that full faith and credit deeply impacts law and society.

19. 28 U.S.C. § 1738 (2012). The first two sentences of § 1738 describe how to authenticate the records and prove their authentication in court. The final sentence, quoted above, states the effect that the judgment has once authenticated and proven.

20. For the purposes of this article, we are concerned only with the res judicata effect that a judgment rendered in one state court has in a subsequent proceeding in a state court across state lines. Even though we are only concerned with state-state relations, it is important to note that 28 U.S.C. § 1738 “imposes a judgment enforcement mandate on ‘every court within the United States and its Territories and Possessions,’ necessarily including enforcements performed state-to-state, between states and United States territories, state-to-federal, and federal-to-state.” James P.

one has been filed in state two, it is entitled to full faith and credit in state two and must be given the same effect in state two as the judgment would have under state one's law or usage.²¹ In other words, each state must "give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it."²²

That the res judicata effect of a judgment applies across state lines is essential not only to the working of the Full Faith and Credit Clause but also to the smooth workings of the entire judiciary.²³ The United States Supreme Court has stated that the purpose of the clause was to:

alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.²⁴

The credit owed a sister-state judgment is exacting, and since at least the early twentieth century with the decision in *Fauntleroy v. Lum*,²⁵ there has been no public policy exception to the Full Faith and Credit Clause regarding judgments.²⁶ Therefore, even if a judgment rendered in state one

George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. TEX. L. REV. 399, 405 (2009) (quoting 28 U.S.C. § 1738).

21. *Id.* at 405-06. See also CASAD & CLERMONT, *supra* note 6, at 213 ("When the prior judgment was rendered by a state court and the second action is brought in a court of another state, the *Full Faith and Credit Clause* of the Federal Constitution requires the second court to give the same effect to a valid and final judgment as the judgment would have in the courts of the rendering state."); Robert A. Sedler, *The Constitution and the American Federal System*, 55 WAYNE L. REV. 1487, 1538-39 (2009) ("Under the Full Faith and Credit Clause then, a final judgment on the merits rendered by a state court or a federal court must be recognized by another state court or federal court, subject only to the following exceptions." Professor Sedler then goes on to list the four narrow exceptions to full faith and credit, none of which are important to our discussion); VESTAL, *supra* note 5, at 434-35 ("Simply stated, the full faith and credit concept requires that the judgment handed down in State A be given the same effect in State B that it would have been given in State A . . . This means that the same preclusive effect must be given in terms of issue preclusion, claim preclusion, the parties or persons covered, and the issues involved.")

22. *Durfee v. Duke*, 375 U.S. 106, 109 (1963).

23. JACKSON, *supra* note 16, at 4 ("[The Full Faith and Credit Clause] serves to co-ordinate the administration of justice among the several independent legal systems which exist in our federation."). See also Sedler, *supra* note 21, at 1537-38 ("The primary historical purpose of the Full Faith and Credit Clause was to ensure that judgments rendered by one state court be recognized by another state court."); *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) ("The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.")

24. *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

25. 210 U.S. 230 (1908).

26. See *id.* Suit was brought in a Missouri court on a claim governed by Mississippi law. The Missouri court misapplied Mississippi law, with the result that it upheld a gambling contract that was illegal (and therefore presumably against the public policy of Mississippi) under

is against the public policy of state two, state two must enforce the judgment.

The premise that there is no public policy exception to the enforcement of a sister-state judgment was thrown a slight wrinkle in the United States Supreme Court decision *Baker v. General Motors Corp.*²⁷ Because this case is crucial to understanding the Montana Supreme Court's decision in *Wamsley II*, a brief summary of *Baker* is important. The dispute before the Supreme Court in *Baker* centered around Ronald Elwell, a General Motor ("GM") employee of thirty years.²⁸ Pursuant to his job responsibilities, Elwell often helped GM lawyers in defending GM against products liability suits.²⁹ Elwell's relationship with GM "soured," and during a deposition in a products liability action, Elwell testified that the GM pickup truck fuel system was inferior to competing products.³⁰ Elwell soon sued GM for wrongful discharge and other tort and contract claims, and GM counterclaimed for Elwell's alleged breach of fiduciary duty to GM.³¹ The Michigan trial court granted GM's motion for a preliminary injunction, which prevented Elwell from further disclosing confidential GM information.³² Elwell and GM settled their dispute and entered into a proposed permanent injunction that was accepted by the trial court.³³ The permanent injunction prevented Elwell from testifying in any action involving GM.³⁴

Mississippi law. The Supreme Court held that Mississippi courts had to enforce the Missouri judgment, even though the Missouri court had misapplied Mississippi law.

27. 522 U.S. 222 (1998).

28. *Id.* at 226.

29. *Id.* at 227.

30. *Id.*

31. *Id.*

32. *Id.* The exact terms of the injunction prevented Elwell from:

[C]onsulting 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 [to be] filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employments with General Motors Corporation.

Id. at 227-28.

33. *Id.* at 228. The permanent injunction had two proscriptions. The first proscription was essentially the same as the temporary injunction ordered by the trial court. The second proscription is what ultimately caused the case to go all the way to the Supreme Court. The second proscription enjoined Elwell from "testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial, as an expert witness, or as 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." *Id.*

34. *Id.* Also in the settlement agreement, Elwell and GM agreed that if a court or other tribunal subpoenaed Elwell to testify, his testimony at such a hearing would not violate the injunction. *Id.* at 229.

Subsequently, the Bakers, who sued GM for wrongful death pursuant to a car accident that killed two individuals, sought to depose Elwell and call him as a witness at trial.³⁵ The federal district court in Missouri allowed Elwell to testify and cited two reasons for this ruling: (1) Michigan's injunction need not be enforced by Missouri because enforcing the injunction would violate Missouri's public policy of shielding from disclosure only privileged/confidential information; and (2) since Michigan could modify the injunction, a court elsewhere could modify the injunction as well.³⁶

After Elwell testified and a jury returned a verdict of \$11.3 million, the Eighth Circuit Court of Appeals reversed, holding the district court erroneously placed too much emphasis on Missouri's public policy of disclosing relevant, non-privileged information, and not enough emphasis on Missouri's public policy of applying full faith and credit.³⁷ Additionally, the Eighth Circuit determined since no Michigan court had modified the injunction, it was premature for the Missouri district court to assume that a court in a different jurisdiction could modify the injunction.³⁸ On appeal to the Supreme Court, the issue was "whether the full faith and credit requirement stops the Bakers, who were not parties to the Michigan proceeding, from obtaining Elwell's testimony in their Missouri wrongful-death action."³⁹

Writing for the Court, Justice Ginsburg summarized the demands of the Full Faith and Credit Clause regarding recognition of sister-state judgments:

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.⁴⁰

The Court went on to affirm the continued vitality of *Fauntleroy* by stating there is "no roving 'public policy exception' to the full faith and credit due *judgments*."⁴¹ While this statement is clear, the rest of Justice Ginsburg's opinion is rather murky. Ultimately, the majority reversed the Eighth Circuit, concluding that Elwell could not be barred from testifying in

35. *Id.*

36. *Id.* at 230.

37. *Id.*

38. *Id.* at 231.

39. *Id.*

40. *Id.* at 233 (citing cases).

41. *Id.*

the Missouri proceeding.⁴² However, it is unclear on precisely what grounds the majority based the holding. Justice Kennedy, writing in concurrence, argued that the majority need not have entered into its extended foray into full faith and credit jurisprudence – instead, the case should have been decided on narrower *res judicata* grounds.⁴³ Justice Kennedy argued that 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.”⁴⁴ Because the Bakers were neither parties to the Michigan litigation nor subject to the jurisdiction of the Michigan court, a Michigan court would not enforce the injunction against the Bakers, and thus the Missouri court need not enforce it against the Bakers either.⁴⁵

Unfortunately, Justice Ginsburg and the majority did not decide the case on those grounds, but instead created two novel exceptions to full faith and credit. First, a court outside the issuing state may decline to enforce a judgment which purports “to accomplish an official act within the exclusive province of that other State[.]”⁴⁶ Second, a state need not enforce a judgment of another state when the judgment “interfere[s] with litigation over which the ordering State had no authority.”⁴⁷ Applying these “exceptions” to the *Baker* controversy, the majority held “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.”⁴⁸

While the majority did go on to assert that its holding created no general exception to the command of full faith and credit,⁴⁹ legal writers have acknowledged that *Baker* created a wrinkle in full faith and credit jurisprudence.⁵⁰ One writer observed, “Justice Ginsburg may have created an area of ambiguity that will, as Justice Kennedy predicts, render the

42. *Id.* at 240.

43. *Id.* at 246-47 (Kennedy, J., concurring).

44. *Id.* at 247 (Kennedy, J., concurring).

45. *Id.* (Kennedy, J., concurring).

46. *Id.* at 235.

47. *Id.*

48. *Id.* at 239.

49. *Id.* (“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.”).

50. See generally Kaleen S. Hasegawa, *Re-Evaluating the Limits of the Full Faith and Credit Clause After Baker v. General Motors Corporation*, 21 U. HAW. L. REV. 747 (1999); Earl M. Maltz, *The Full Faith and Credit Clause and the First Restatement: The Place of Baker v. General Motors Corp. in Choice of Law Theory*, 73 TUL. L. REV. 305, 305 (1998) (acknowledging that “[m]ost conflicts of law scholars were undoubtedly disappointed by the majority opinion in *Baker v. General Motors Corp.*”).

rationale vulnerable to later misinterpretation.”⁵¹ This same writer goes on to prophesy that Justice Ginsburg’s murky treatment of full faith and credit “may mislead or even encourage later courts to decline to recognize foreign judgments because those judgments purportedly ‘interfered with litigation’ or attempted to ‘accomplish an official act.’ ”⁵² As we will soon see in the Montana Supreme Court decision in *Wamsley II*, this prophecy came true.

IV. DECLARATORY JUDGMENTS

Suits for declaratory judgment have become a popular and less expensive way of resolving disputes and clarifying legal rights and obligations.⁵³ It is important to note that a suit for declaratory relief differs in form “in no essential respect from any other action, except that the prayer for relief does not seek execution or performance from the defendant or opposing party.”⁵⁴ Rather than seeking coercive relief, such as a court order that a defendant do something or refrain from doing something, a plaintiff in a declaratory judgment suit is merely seeking a declaration of the legal relationship between the parties.⁵⁵

The federal Declaratory Judgment Act provides: “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”⁵⁶ The Uniform Declaratory Judgment Act (“UDJA”) has similar language and was adopted by thirty eight states.⁵⁷ North Dakota has adopted the UDJA, and this fact will become important in this article.⁵⁸

51. Hasegawa, *supra* note 50, at 772.

52. *Id.* (quoting *Baker v. General Motors Corp.* 522 U.S. 222, 235 (1998) (also noting that ultimately, “an alter ego of the public policy exception may have been created.”).

53. Ryan R. Dreyer, *Civil Procedure—Discouraging Declaratory Actions in Minnesota—The Res Judicata Effect of Declaratory Judgments In Light of State v. Joseph*, WM. MITCHELL L. REV. 613, 618-19 (2002) (“Declaratory relief is an alternative remedy available for use in resolving disputes or potential disputes in a fashion that is faster, cheaper, and less harsh than coercive relief.”).

54. EDWIN BORCHARD, DECLARATORY JUDGMENTS 23 (1934).

55. *Id.* See also Elisabeth L. Hisserich, *The Collision of Declaratory Judgments and Res Judicata*, 48 UCLA L. REV. 159, 161 (2000) (“Unlike coercive relief in favor of the plaintiff, which motivates the defendant to do or to refrain from doing something, declaratory judgments merely declare the legal relationships between the parties.”).

56. 28 U.S.C. § 2201(a) (2012).

57. E.H. Schopler, Annotation, *Extent to Which Principles of Res Judicata are Applicable to Judgments in Actions for Declaratory Relief*, 10 A.L.R. 782 (2011).

58. N.D. CENT. CODE. § 32-23-01 (2010):

A court of record within its jurisdiction shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or

A simple example will help illustrate the nature of suits for declaratory relief. Suppose insured A has an insurance policy covering his barn from insurer B. The policy provides that insurer B will pay for water damage to the barn. However, the policy excludes hail damage. Insured A brings a claim to insurer B, requesting B pay for damages that A incurred when a storm swept across the countryside, casting hail and large volumes of rain at his barn. Insurer B then files a declaratory judgment action in state court in order to determine whether the exclusion in the policy applied to the damage to insured A's barn. Note that whatever the court decides, the "defendant" in the action, insured A, will not be required to do anything or refrain from doing anything. In other words, insurer B is not requesting coercive relief but simply declaratory relief.

After a court issues declaratory relief to a party, the question then becomes: what *res judicata* effect does a declaratory judgment have on further litigation? Both the federal Declaratory Judgment Act and the UDJA provide that a declaratory judgment "shall have the force and effect of a final judgment or decree."⁵⁹ While the language of these statutes suggest that a declaratory judgment has the same issue preclusion and claim preclusion effect as any other judgment, that is not necessarily the case. Many courts and some scholars have distinguished between claim preclusion and issue preclusion when it comes to the force that a declaratory judgment will have in future litigation.⁶⁰

Professors Casad and Clermont have summarized the preclusive effect afforded declaratory judgments in subsequent actions, stating:

A valid and final judgment in a suit solely for declaratory relief has two sorts of *res judicata* effects in a subsequent civil action. First, it is conclusive between opposing parties as to the matters declared, but it has no further claim preclusion effect and so does not preclude a later action for damages or other coercive relief. Second, a litigant is subject to issue preclusion, under the normal rules of that doctrine.⁶¹

As Professors Casad and Clermont acknowledge, it is settled that declaratory judgments have the same issue preclusion effect as any other

decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree.

Id.

⁵⁹ Schopler, *supra* note 57. See also 28 U.S.C. § 2201(a); N.D. CENT. CODE § 32-23-01 (A declaratory judgment "shall have the force and effect of a final judgment or decree.").

⁶⁰ CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COPPER, FEDERAL PRACTICE AND PROCEDURE § 4446 (2d ed. 1986).

⁶¹ CASAD & CLERMONT, *supra* note 6, at 190.

judgment on the merits.⁶² If this were not the case, the purpose of securing a declaratory judgment would be frustrated. Litigants bring declaratory judgment actions to decide specific issues of law or fact; if these issues decided by the declaratory judgment were not preclusive in a later action, the declaratory judgment would be a waste of time and money.⁶³

While issue preclusion as applied to declaratory judgments is quite straightforward, claim preclusion is not.⁶⁴ Professors Casad and Clermont assert that declaratory judgments have “no further claim preclusion effect,”⁶⁵ and while this is mostly true, it is not entirely true.⁶⁶ While some courts may give declaratory judgments claim preclusion effect and others do not, what is important to know for purposes of this article is that all courts recognize, at a minimum, that issues decided between two parties in a declaratory judgment action are preclusive between those parties in subsequent litigation.⁶⁷

V. WAMSLEY I AND WAMSLEY II

With the essential understanding of issue and claim preclusion, the Full Faith and Credit Clause, and declaratory judgment actions, we turn to the

62. WRIGHT, *supra* note 60, § 308 (“Matters actually litigated by the parties and determined by a declaratory judgment are thus precluded from further litigation.”); *see also* Schopler, *supra* note 57, at 783 (“So far as declaratory judgments are concerned, the principle of [issue preclusion] applies in the same way as it applies to any other judgment.”); RESTATEMENT (SECOND) OF JUDGMENTS § 33 (1982) (“A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.”).

63. WRIGHT, *supra* note 60, § 308 (“The very purpose of [a declaratory judgment] remedy is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by *res judicata*.”).

64. *Id.* at 313 (“As clear as the issue-preclusion effects of a declaratory judgment may be, the claim-preclusion effects are shrouded in miserable obscurity.”); *see also* Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1293 (2010) (“Many courts and commentators have said that [declaratory judgments] ha[ve] the same claim-preclusive effect as any other judgment. And yet this view has probably always been wrong and is certainly wrong today in the vast majority of US jurisdictions. A request for purely declaratory relief has issue-preclusive effect for what was actually decided, at least between the parties, but it has essentially no claim-preclusive effect at all.”).

65. CASAD & CLERMONT, *supra* note 6, at 190.

66. *See* Hisserich, *supra* note 55, at 173-74 (listing and discussing the states that apply claim preclusion to declaratory judgments and those that only apply issue preclusion); *see also* Dreyer, *supra* note 53, at 620 (advocating that claim preclusion should not extend to declaratory judgments, but recognizing that some courts do give declaratory judgments claim preclusion effect).

67. *See, e.g.,* Allan Block Corp. v. County Materials Corp., 512 F.3d 912, 916 (7th Cir. 2008) (“Of course if specific issues are resolved in the declaratory judgment action, their resolution will bind the plaintiff by virtue of the doctrine of [issue preclusion] should he later seek an injunction or damages.”).

two decisions that shall be referred to as *Wamsley I*⁶⁸ and *Wamsley II*.⁶⁹ At the center of the litigation in *Wamsley I* and *Wamsley II* was whether North Dakota or Montana law applied to the controversy. Alan and Sharon Wamsley, residents of North Dakota, were driving their Chrysler in Montana when they were struck and killed by another automobile.⁷⁰ At the time of the accident, the Wamsleys owned three vehicles, each with a \$100,000 per person, per accident policy from Nodak Mutual Insurance Company (“Nodak Mutual”).⁷¹ Under North Dakota law, the policy coverage could not be stacked, meaning the most the Wamsley heirs could recover from Nodak Mutual was \$200,000—the amount Nodak Mutual paid.⁷² However, under Montana law the policies may be stacked, meaning the Wamsley heirs could recover as much as \$600,000 from Nodak Mutual.⁷³

After astute advice from their attorney, Nodak Mutual served a summons and complaint upon each of the Wamsley heirs dated June 4, 2003, seeking a declaratory judgment in North Dakota that North Dakota law applied and stacking was not allowed.⁷⁴ The summons and complaint was served on each of the heirs between June 4 and 18, 2003, and sought a judgment declaring that the Wamsley insurance policies could not be stacked.⁷⁵ It is not clear why Nodak Mutual waited to file the summons and complaint in district court, but it is clear that the Wamsley heirs were notified by at least June 18, 2003, that Nodak Mutual believed that the policy did not permit stacking and that it was seeking a declaratory judgment to that effect.

On June 23, 2003, the Wamsley heirs⁷⁶ sued Nodak Mutual in Montana district court.⁷⁷ On June 25, 2003, Nodak Mutual filed the summons and complaints it had served on each of the Wamsley heirs in North Dakota district court.⁷⁸ The North Dakota district court granted Nodak Mutual’s

68. Nodak Mut. Ins. Co. v. Wamsley, 2004 ND 174, 687 N.W.2d 226.

69. Wamsley v. Nodak Mutual Ins. Co., 2008 MT 56, 341 Mont. 467, 178 P.3d 102.

70. *Wamsley I*, ¶ 2, 687 N.W.2d at 228.

71. *Id.* ¶ 3, 687 N.W.2d at 228.

72. *Id.*

73. *Id.* ¶ 9, 687 N.W.2d at 230.

74. *Id.* ¶ 4, N.W.2d at 228.

75. *Id.*

76. Technically, the Wamsley estate, not the Wamsley children, brought the action in Montana. However, this fact does not change the legal analysis of res judicata and full faith and credit, because, as the Montana court correctly articulated, the estate and the children were in privity. Wamsley v. Nodak Mutual Ins. Co., 2008 MT 56, ¶ 53, 341 Mont. 467, 483, 178 P.3d 102, 114. Thus, for simplicity sake, I refer to the Wamsley children as being parties to both the North Dakota and Montana action.

77. *Wamsley I*, ¶ 5, 687 N.W.2d at 228.

78. *Id.*

motion for summary judgment, holding that North Dakota law applied.⁷⁹ Therefore, Nodak Mutual had fulfilled its obligation under the insurance policies by paying the heirs the \$200,000 policy limit on the car involved in the accident.⁸⁰ The Wamsley heirs appealed, and the issue before the North Dakota Supreme Court was a strict choice-of-law issue—namely, whether North Dakota law or Montana law applied to the Wamsley car accident and resolution concerning subsequent litigation between the Wamsley heirs and Nodak Mutual.⁸¹ The court issued its opinion on September 13, 2003, and acknowledged that North Dakota followed the Leflar “significant contacts” test in determining what law to apply.⁸² The North Dakota Supreme Court then applied the “significant contacts” test to the dispute between the Wamsley heirs and Nodak Mutual, finding that North Dakota, not Montana, had the most significant contacts.⁸³ The court upheld the district court’s judgment applying North Dakota law.⁸⁴

Meanwhile, the Montana litigation between the Wamsley heirs and Nodak Mutual was still brewing. From what we know about *res judicata*, declaratory judgments, and the Full Faith and Credit Clause, Nodak Mutual should have been able to take the judgment from the North Dakota court to Montana, and a court in Montana should give it preclusive effect. The declaratory judgment action in North Dakota reached a final, binding decision on the parties once the North Dakota Supreme Court upheld the district court. As we know, the North Dakota judgment does not have *claim* preclusive effect on later or concurrent litigation because it was a suit for declaratory relief. Nodak Mutual would not be able to use the North Dakota judgment to stop the Wamsley heir’s suit in Montana for damages or other coercive relief. However, the North Dakota judgment should have *issue* preclusion effect for any issues that were decided—here the issue of what choice-of-law should apply to the controversy. However, the Montana courts refused to give the North Dakota judgment preclusive effect in the litigation between the Wamsley heirs and Nodak Mutual in Montana, and the reason for this refusal goes back to Justice Ginsburg and *Baker v. GM*.

79. *Nodak Mutual Ins. Co. v. Wamsley*, 2003 WL788099, at * 3 (N.D. Dist. Ct. Oct. 7, 2003).

80. *Wamsley I.*, ¶ 6, 687 N.W.2d at 228.

81. *Id.* ¶ 9, 687 N.W.2d at 230.

82. *Id.* ¶ 23, 687 N.W.2d at 231. For a comprehensive treatment of the issues surrounding choice-of-law and the different approaches courts use in deciding choice-of-law conflicts, see FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (2005); CONFLICT OF LAWS (Richard Fentiman ed., 2005).

83. *Wamsley I.*, ¶¶ 9-23, 687 N.W.2d at 231-35.

84. *Id.* ¶ 24, 687 N.W.2d at 235.

On November 9, 2005, over a year after the North Dakota Supreme Court's ruling, the Montana district court rendered a final judgment against Nodak Mutual, holding that the Wamsley heirs could stack the insurance policies and Nodak Mutual was thus liable for \$400,000.⁸⁵ On appeal to the Montana Supreme Court, the court examined seven issues, but the issue pertinent to this discussion is whether "the District Court err[ed] by refusing to accord preclusive effect to the rulings from the North Dakota courts under the Full Faith and Credit clause of the United States Constitution."⁸⁶ The Montana Supreme Court answered in the negative, holding that Montana courts need not give preclusive effect to the North Dakota declaratory judgment.⁸⁷ I argue that the Montana Supreme Court erred in at least three ways.

First, the Montana Supreme Court erred by looking at the *res judicata* law of Montana, rather than North Dakota, to determine the preclusive effect owed to the North Dakota judgment.⁸⁸ Instead, the Montana Supreme Court should have asked what preclusive effect a North Dakota court would give the North Dakota declaratory judgment.⁸⁹ An analysis of North Dakota law proves that a North Dakota court would give preclusive effect to the North Dakota declaratory judgment.⁹⁰ While Montana erred by looking at Montana preclusion law rather than North Dakota preclusion law, this error did not impact the outcome of the case. The court agreed that the basic elements of *res judicata* were met by the North Dakota judgment, but the court found it "problematic" to enforce the judgment.⁹¹

85. *Wamsley II*, 2008 MT 56, ¶ 2..

86. *Id.*, ¶ 19.

87. *Id.*, ¶ 59.

88. *Id.*, ¶ 52 n.2 (The Montana Supreme Court recognized that "full faith and credit requires a sister state to give a judgment the *res judicata* effect it would have in the State which initially rendered the judgment." However, the court then went on to analyze the preclusive effect of the North Dakota judgment in light of Montana *res judicata* law.).

89. See *CASAD & CLERMONT*, *supra* note 6, at 213 ("When the prior judgment was rendered by a state court and the second action is brought in a court of another state, the Full Faith and Credit Clause of the Federal Constitution requires the second court to give the same effects to a valid and final judgment as the judgment would have in the courts of the rendering state.").

90. See *In Re Bjerke's Estate*, 181 N.W.2d 126, 127 (N.D. 1970) (holding that a declaratory judgment that is final is "res judicata of the issue decided by it" and is consequently preclusive of the issue decided in subsequent litigation); *Great Northern Ry. Co. v. Mustad*, 76 N.D. 84, 92 (1948) (stating that "[t]he judgment in a declaratory action is a conclusive determination of rights, status, or other legal relations and carries the same weight as any other judgment under the principles of *res judicata*."). Both *In Re Bjerke's Estate* and *Great Northern Ry. Co.* established that the issue decided in *Wamsley I*, namely that North Dakota law applied and stacking was not permitted, would be preclusive of the issue if a subsequent lawsuit between the Wamsleys and Nodak Mutual had been filed in North Dakota seeking to litigate the same issue.

91. *Wamsley II*, 2008 MT 56, ¶ 54 ("[W]e agree with Nodak that the basic elements of *res judicata* seem to be satisfied by the North Dakota rulings. If full faith and credit were to be accorded the North Dakota rulings, then theoretically after October 7, 2003, the District Court in

The second error the Montana Supreme Court committed was to refuse to enforce the North Dakota declaratory judgment based on the judgment being an illicit attempt to control the Montana litigation. The Montana Supreme Court acknowledged that “there is no public policy exception to full faith and credit.”⁹² However, the court cited *Baker* for the following proposition: “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.*”⁹³ The court then faulted Nodak Mutual, and by inference the North Dakota courts, for using the declaratory judgment to improperly apply North Dakota law “through the back door,” stating “[i]t is evident that the declaratory judgment in North Dakota was brought for the purpose of preempting the District Court in Montana from exercising control over the judicial processes necessary to resolve this dispute.”⁹⁴ If the North Dakota judgment was given preclusive effect, the Montana Supreme Court went on, it would effectively mean “that the courts of [North Dakota] can control what goes on in the courts of [Montana].”⁹⁵

Even if Justice Ginsburg did create a novel exception to full faith and credit whereby a second state can refuse to enforce a judgment rendered in the first state which improperly interfered with litigation over which the first state had no authority, this limited exception should not apply in the context at issue in *Wamsley II*. The Michigan trial court in *Baker* permanently enjoined a person from testifying in litigation anywhere in the country, thus affecting parties nowhere near Michigan or its jurisdiction. In that situation, one could say that the Michigan court was improperly meddling in other court’s business. On the other hand, the North Dakota district court was not improperly interfering with litigation over which it had no authority, but rather deciding the issue in the case that was directly before it.

Furthermore, it is disingenuous for the Montana Supreme Court to state that the North Dakota judgment was an effort to apply North Dakota law “through the back door,” and preempt Montana from exercising control of the lawsuit filed in Montana. Nodak Mutual sent the *Wamsley* heirs the

Montana would be compelled to apply North Dakota law to the Estate’s stacking claims. However, the unquestioning application of full faith and credit in this case is problematic.”).

92. *Id.*, ¶ 61.

93. *Id.*, ¶ 57 (quoting *Baker v. General Motors Corp.* 522 U.S. 222, 235 (1998)) (emphasis added by *Wamsley II* court).

94. *Id.*, ¶ 59.

95. *Id.*, ¶ 60 (quoting *Baker*, 522 U.S. at 236 n.9) (bracketed text added by *Wamsley II* court).

declaratory judgment summons and complaint at least on or before June 18, 2003.⁹⁶ The Wamsley heirs did not file suit in Montana district court until June 23, 2003.⁹⁷ If anyone was trying to preempt another court and get a certain state law to apply, it was the Wamsley heirs. The Wamsley heirs knew that Nodak Mutual was going to file suit in North Dakota and thus quickly filed suit in Montana hoping that a Montana court would allow stacking. Neither the Wamsley heirs nor Nodak Mutual should be faulted for their litigation tactics.⁹⁸

Finally, the Montana Supreme Court's third error was to read *Baker* too broadly. The *Baker* majority asserted that “[o]rders commanding action or inaction have been denied enforcement in a sister State[,]” and went on to hold that a Michigan court could not command Elwell to refrain from testifying through a permanent injunction—essentially an order commanding inaction.⁹⁹ However, the very nature of declaratory judgments is that they *do not* command action or inaction.¹⁰⁰ Instead, they merely seek a determination or answer to an issue. Treating a declaratory judgment in the same manner as an injunction is simply inapposite. Even a robust belief that the *Baker* majority created a new exception to full faith and credit cannot save the Montana court. In the end, the Montana Supreme Court unfortunately succumbed to the predictions of Justice Kennedy and Kaleen Hasegawa.¹⁰¹

As a thought experiment, it is interesting to ponder what effect, if any, a change in timing would have had on Montana's legal obligation to give full faith and credit to the North Dakota judgment. Suppose, for instance, that the Wamsley heirs had filed the action in Montana long before Nodak Mutual filed the declaratory judgment in North Dakota. Both the Montana court and the Wamsley heirs would have a few different options at their disposal. First, the Wamsley heirs could bring a motion in North Dakota to stay or dismiss the North Dakota declaratory judgment.¹⁰² Nodak Mutual

96. Nodak Mut. Ins. Co. v. Wamsley, 2004 ND 174, ¶ 5, 687 N.W.2d 226, 228.

97. *Id.*

98. *See generally*, James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 773 (1999).

99. *Baker*, 522 U.S. at 235.

100. BORCHARD, *supra* note 54, at 23.

101. Hasegawa, *supra* note 50, at 772 (“Justice Ginsburg may have created an area of ambiguity that will, as Justice Kennedy predicts, render the rationale vulnerable to later *misinterpretation*.”) (emphasis added).

102. George, *supra* note 98, at 778. Dismissals are not preferred by courts when there is parallel litigation, but stays are more common. George writes:

Upon request, a court may suspend prosecution of its own action, pending resolution of the other case. If the other case becomes final (that is, it is decided on the merits by a competent court, and becomes final under the law of the rendering state or country), it should have preclusive effect as to the stayed action which can then be dismissed.

tried a similar tactic by filing a motion to stay the Montana legal proceedings while the North Dakota declaratory judgment action was pending.¹⁰³ The Montana court did not grant the motion to stay, in part, because of perceived forum shopping and because the actions were filed so close in time.¹⁰⁴ However, if the Montana action was filed well before the North Dakota declaratory judgment, it is likely that the North Dakota court would have granted a motion to stay or dismiss.¹⁰⁵

Another option to prevent the North Dakota court from reaching a final, binding decision would be for the Montana court to issue an antisuit injunction.¹⁰⁶ This option would have been especially appealing if the North Dakota court refused to dismiss or stay the declaratory judgment action.¹⁰⁷ An antisuit injunction enjoins an opposing party from pursuing the same or similar case in another state.¹⁰⁸ While this type of injunction would seem to squarely violate *Baker*, the majority in *Baker* side-stepped the issue, writing: “This Court . . . has not yet ruled on the credit due to a state-court injunction barring a party from maintaining litigation in another State . . . State courts that have dealt with the question have, in the main, regarded antisuit injunctions as outside the full faith and credit ambit.”¹⁰⁹ Since *Baker* leaves open the possibility for antisuit injunctions, the Montana court could have tried to issue such an injunction to prevent the North Dakota court from reaching its final, binding decision.

If there were a longer gap in the timing of the two competing lawsuits, then the problem of having two widely divergent final judgments would likely not have arisen.¹¹⁰ However, the problem arose because the Montana action and the North Dakota declaratory judgment action were filed mere days apart. As Professor George notes, “[t]he United States Constitution’s strong full faith and credit mandate . . . does not apply to pending

On the other hand, if the parallel case does not result in a valid and final judgment on the merits, then the stayed case may be revived and litigated.

Id.

103. *Wamsley II*, 2008 MT 56, ¶ 33.

104. *Id.*

105. George, *supra* note 98, at 782 (discussing that “[i]n many jurisdictions, a second-filed declaratory action is dismissed as a matter of law if it seeks no greater relief than the first-filed action.”).

106. *Id.* at 780-81. See John Ray Phillips III, *A Proposed Solution To The Puzzle Of Antisuit Injunctions*, 69 U. CHI. L. REV. 2007, 2011 (2002).

107. George, *supra* note 98, at 780-81.

108. *Id.* at 780.

109. *Baker v. General Motors Corp.*, 522 U.S. 222 at 236 n.9 (citing Justice Ginsburg’s past scholarship).

110. See George, *supra* note 98, at 777-79 (discussing the various methods of resolving duplicative, parallel litigation, including antisuit injunctions and dismissals/stays—which have already been discussed—as well as other methods).

litigation.”¹¹¹ Neither Montana courts nor North Dakota courts were obligated to respect or recognize the parallel litigation concerning the Wamsley heirs and Nodak Mutual in the other state.¹¹² Since the actions were filed so close in time, neither the North Dakota court nor the Montana court was willing to abdicate authority to the other court. Thus, it was truly a race to the finish line—the first final, binding decision of either court should have been *res judicata* on the other court. Since the North Dakota court reached a valid, final judgment first, the Montana court should have given the judgment full faith and credit.

VI. CONCLUSION

Declaratory judgments can be a cost-effective and time-saving method of determining the legal rights and obligations between parties. A declaratory judgment can also help resolve and settle disputes once a final judgment has been issued from a court adjudicating the parties’ rights and obligations. However, the benefit of a declaratory judgment vanishes when a court refuses to give the judgment issue preclusion effect in subsequent or concurrent litigation. Instead of saving the parties’ time and money, the decision in *Wamsley II* put the Montana Supreme Court’s stamp on needless waste and expense in litigation.

While the United States Supreme Court’s decision in *Baker v. GM* may have created complications, courts moving forward should not treat *Baker* as creating a new exception to full faith and credit. Instead of treating *Baker* as creating an expansive exception to full faith and credit where a state “interfere[s] with litigation over which the ordering State had no authority,”¹¹³ courts should heed the cautionary wisdom of Justice Kennedy’s concurrence. If declaratory judgments are not given issue preclusive effect in other proceedings, then state judicial systems may not operate harmoniously—to the frustration of the Full Faith and Credit Clause.¹¹⁴ The United States Supreme Court would be wise to revisit the majority’s holding in *Baker* in order to provide clarity and direction to state courts.

111. *Id.* at 820.

112. *Id.* (acknowledging that unlike the rigid rules of full faith and credit, the only “authority” regarding parallel litigation is the “non-binding comity doctrine, which leaves state courts free to maintain local preferences and prejudices.”).

113. *Baker*, 522 U.S. at 235.

114. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).