

MR. JUSTICE RUTLEDGE AND FULL FAITH AND CREDIT

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"He is bold, willing to innovate, does not himself shrink from broad responsibility and would not have the Court abdicate its powers."¹ This characterization is more applicable to some of the justices of the Supreme Court of the United States during the past decade than it is to others. It is applicable to none more than to Mr. Justice Rutledge and as to him, no more so than when he dealt with the complexities which from time to time plague the Court under the full faith and credit clause of the Constitution.²

During the span of his judicial career, Mr. Justice Rutledge participated in some eighteen or twenty cases involving the "lawyers' clause."³ This is not a large number of cases for a ten-year period. But the list includes such captions as *Williams v. North Carolina*,⁴ *Estin v. Estin*,⁵ *Angel v. Bullington*,⁶ *Halvey v. Halvey*,⁷ *Morris v. Jones*,⁸ and others which are destined to occupy a page in the chronicle of the full faith and credit clause to perplex the minds of men for many years to come.

There is little doubt that the name Rutledge, in our judicial annals, will for the most part be identified with the long and increasingly difficult struggle to obtain and maintain the civil liberties which Americans, for a hundred and sixty-one years, have been told were their constitutional due. But with the

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1. Levitan, *Mr. Justice Rutledge*, 34 V.A. L. Rev. 526, 551 (1948).

2. Art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The Congress has acted under this clause, in part, as follows: "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." 28 U. S. C. A. § 1738 (1950).

3. *Union Nat'l Bank v. Lamb*, 337 U. S. 38 (1949); *Rice v. Rice*, 336 U. S. 674 (1949); *Kreiger v. Kreiger*, 334 U. S. 555 (1948); *Estin v. Estin*, 334 U. S. 541 (1948); *Coe v. Coe*, 334 U. S. 378 (1948); *Sherrer v. Sherrer*, 334 U. S. 343 (1948); *Order of United Commercial Travelers v. Wolfe*, 331 U. S. 586 (1947); *Industrial Comm'n v. McCartin*, 330 U. S. 622 (1947); *New York ex rel. Halvey v. Halvey*, 330 U. S. 610 (1947); *Angel v. Bullington*, 330 U. S. 183 (1947); *Morris v. Jones*, 329 U. S. 545 (1947); *Griffin v. Griffin*, 327 U. S. 220 (1946); *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U. S. 279 (1945); *Williams v. North Carolina*, 325 U. S. 226 (1945); *Williams v. North Carolina*, 317 U. S. 287 (1942); *State Farm Ins. Co. v. Duel*, 324 U. S. 154 (1945); *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430 (1943); *Fowler v. Pilson*, 123 F.2d 918 (D. C. Cir. 1941).

4. 317 U. S. 287 (1942); 325 U. S. 226 (1945).

5. 334 U. S. 541 (1948).

6. 330 U. S. 183 (1947).

7. 330 U. S. 610 (1947).

8. 329 U. S. 545 (1947).

unfolding story of one of the most technical of all constitutional doctrines, it will appear that here also Mr. Justice Rutledge had a firm grasp of the problems and their social and political implications.

For Mr. Justice Rutledge, federalism, as we know it, represented both his constitutional and political faith.⁹ It was largely the boldness and the skill of Marshall in using the commerce clause to fashion a nation that evoked the strong emotion—near hero-worship, which Mr. Justice Rutledge had for the great Chief Justice. He was not, however, unaware of the function of the full faith and credit clause as a nationally unifying principle, and the role of the Court, in manipulating it, would have been a much more effective one had some of his brethren on occasion not shrunk from the broad responsibility which he was willing to assume.

When his brother Douglas pronounced what was supposed to be a death sentence¹⁰ on *Haddock v. Haddock*,¹¹ Justice Rutledge, like many others of us, supposed the end of that bastardized and bastardizing anomaly had come. None protested more vigorously when *Haddock's* ghost began to stalk the long miles from North Carolina to Nevada and return.¹² And it was at this point that Justice Rutledge would have the Supreme Court act as such, and finish the task it had so courageously begun of straightening out one of its most tangled skeins.

It is true, as Mr. Justice Frankfurter has remarked, that the Supreme Court should not be turned into a divorce and probate court for the United States.¹³ It is also true, as Mr. Justice Frankfurter has also announced, that neither the crudest nor the subtlest juggling of legal concepts could enable the Court to bring forth a uniform national law of marriage and divorce.¹⁴ And, to quote Mr. Justice Frankfurter for the third time, tangled marital situations inevitably arise.¹⁵ They arose before *Haddock v. Haddock*, and will continue to arise, regardless of the Court's decisions in the *Williams* cases. But all

9. RUTLEDGE, DECLARATION OF LEGAL FAITH (1947).

10. "*Haddock v. Haddock* is overruled." *Williams v. North Carolina*, 317 U. S. 287, 304 (1942), holding that an *ex parte* divorce in Nevada was entitled to full faith and credit in North Carolina, the matrimonial domicile of the parties, if the plaintiff in Nevada had acquired a domicile there.

11. 201 U. S. 562 (1906), holding that New York, the domicile of the wife at all times and the matrimonial domicile of the spouses, need not recognize a Connecticut degree of divorce obtained *ex parte* by the husband after he had become domiciled there, although concededly the divorce was "valid" in Connecticut.

12. *Williams v. North Carolina*, 325 U. S. 226 (1945), holding that North Carolina, the matrimonial domicile, in a bigamy prosecution might examine the "jurisdictional fact" of domicile in Nevada after a divorce and remarriage there and return to North Carolina. A conviction was upheld in the Supreme Court on the finding by the state court that there had been no change of domicile from North Carolina to Nevada when the divorce was granted there.

13. Concurring in *Williams v. North Carolina*, 317 U. S. 287, 305 (1942).

14. *Id.* at 304.

15. *Ibid.*

this is not to say that the full faith and credit clause and the Act of Congress passed under it have not given the Court a tool with which the evil after-effects of family disorganization may not be substantially minimized. This, over the continuing protest of some of the justices, the Court has succeeded in doing in a half-way manner. Always, however, the second *Williams* case stands as an obstacle to faltering progress.

The first *Williams* case made new law. But the "law" that it made was incomplete. It was not enough. It was no sure foundation upon which to replace the crumbling ruins of the patchwork structure which had arisen from *Haddock*. It required a still bolder stroke, one which Mr. Justice Rutledge was prepared to make in *Williams II*, but with only three of his brethren supporting him.

In *Williams I* the law emerged, for a brief moment, from its "domiciliary wilderness"¹⁶ when the Court answered the question as to "whose domicile" was necessary for divorce by saying "either party's." The sixty-four dollar question was yet to come, namely, what *kind* of domicile. In refusing to "retry the facts," the Court, in effect, refused to answer the question at all, leaving the matter for the states to handle. This, as a settled policy, might have a good bit to be said for it. But once the Court embarks on the full faith and credit enterprise in family matters, it may be a valid criticism that it aborts the process by not finishing the job, thus leaving "to the caprice of juries the faith and credit due the laws and judgments of sister states,"¹⁷ and recreating the constitutional void between due process of law in the decreeing state and full faith and credit in others.

For persons concerned about the dilemma reborn with *Williams II*, two troublesome ideas prevail throughout the majority opinion, both dealt with in Mr. Justice Rutledge's devastating dissent. First is the overconcern lest "the policy of each state in matters of most intimate concern . . . be subverted by the policy of every other State."¹⁸ The emphasis laid on this anxiety appears to rest largely on the many value assumptions which characterize most of the "law" of marriage and divorce and which rarely are examined critically. Here are assumed community attitudes toward marriage, assumed states interests, assumed public policies, assumed familial values, and assumed *mores* which, it is safe to say, frequently do not exist at all, or at most, receive only fragmentary approval in the communities involved.

For who believes that marriage is more sacred in North Carolina than in New York or California, where thousands of Nevada, Florida, Arkansas, and

16. Mr. Justice Rutledge, dissenting in *Williams v. North Carolina*, 325 U. S. 226, 244 (1945).

17. *Id.* at 245.

18. Mr. Justice Frankfurter in *Williams v. North Carolina*, 325 U. S. 226, 231 (1945).

even Parisian or Mexican divorcees remarry each year, presumably to live thereafter in a secondary or tertiary state of matrimonial bliss? Who thinks that the family stood higher in the South Carolina scale of societal values for the first hundred and fifty-nine years of her statehood than for the last two?¹⁹

It is hard, indeed, to believe that it was alone the facts of a Nevada divorce and remarriage which sent two American citizens to the rock pile notwithstanding the Constitution of the United States. Behind it, one may surmise, must have been the vindictiveness of discarded mates, or in any event, of a community whose moral pretensions had been offended by the brazen naiveté of the hapless Williams. Thus, it was less an offense against North Carolinian morals than North Carolina's *mores* which sent this man and woman to jail—not so much what they did but the effrontery with which they did it. One can no more parade his matrimonial deviations in North Carolina, than he can in New York where, if he is not to give up his home, he must become a criminal in order to get a divorce. Prosecutions for adultery in New York, however, are not up to the divorce rate, and jail for “progressive polygamy” is there almost unknown today. It is safe to assume that discreet adultery or matrimonial perjury is tolerated in North Carolina to much the same point as in New York. It is at least questionable whether the *Williams* bigamy case touched “matters of most intimate concern” to North Carolina. It is still more questionable whether the maintenance of community cant justifies dilution of the faith and credit which the Constitution presumably requires to the judicial proceedings of a sister state.

And this leads to the second point in connection with Mr. Justice Frankfurter's opinion in *Williams II*. His overemphasis upon assumed state policy is, quite necessarily, accompanied by an underemphasis on the constitutional policies of national unity and certainty in “matters of most intimate concern” to the nation. Mr. Justice Rutledge did not fail to drive the point home.

It is exactly for the situation where state policies differ that the clause and legislation were intended. . . . The very function of the clause is to compel the states to give effect to the contrary policies of other states when these have been validly embodied in judgment. To this extent the Constitution has foreclosed the freedom of the states to apply their own local policies. The foreclosure was not intended only for slight differences or for unimportant matters. . . . The Constitution was not dealing with puny matters of inconsequential limitations. If the impairment of the power of the states is large, it is one the Constitution itself has made.²⁰

For Mr. Justice Rutledge, legal certainty was no sacred cow. He recognized change as the life of the law as well as the law of life. Nevertheless, he also recognized that certainty and stability are important policies of the law

19. Divorce was barred in South Carolina by the state constitution until 1948.

20. Dissenting in *Williams v. North Carolina*, 325 U. S. 226, 254 (1945).

and, especially in the field of Conflict of Laws, make heavy demands on the lawgiver for consideration. Moreover, where family law is involved, such consideration should be more than ordinarily serious. Uniformity is a crucial aspect here of certainty. Uniformity is not promoted nor for that matter is bigamy discouraged by a situation where a man may legally have one wife in Nevada and a different one in North Carolina. Said he:

No more unstable foundation, for state policies or marital relations, could be formulated or applied. In no region of adjudication or legislation is stability more essential for jurisdictional foundations. Beyond abnegating our function, we make instability itself the constitutional policy when the crux is so conceived and pivoted.²¹

Just four years after *Williams II*, the Supreme Court was "to record in [its] report an example of the manner in which, in the law of domestic relations, 'confusion now hath made his masterpiece.'"²² The *Rice* case differs from the garden variety of migratory divorces in the important factor that the errant plaintiff never returned to the state of matrimonial domicile at all. Herbert Rice had lived twenty years with his wife in Connecticut. He went to Reno, got his divorce (or what Nevada called a divorce), married Hermoine (who also thought the Nevada decree was a divorce), got a job in California, and lived there until he died. When Mr. Justice Rutledge remarked in the *Williams* case that ". . . all that is needed, to disregard it [a foreign divorce decree], is *some* evidence from which a jury reasonably may conclude there was no domiciliary intent when the decree was rendered,"²³ he could hardly have foreseen that within four years, the Court would make it still easier for a state to deny faith and credit to a sister-state decree. The Supreme Court of Errors for Connecticut denied validity to Herbert Rice's Nevada decree, and therefore to his subsequent marriage to Hermoine, by simple resort to the rule that the old domicile is retained until a new one is acquired, coupled with the presumption of continuance of the old domicile until the burden of establishing the new one is met.²⁴ The Supreme Court of the United States approved this technique. "In this subtle way," Professor Rheinstein has pointed out, "the presumption flowing from the Nevada decree is made innocuous and the way is open to a finding that Herbert had never become a domiciliary of Nevada."²⁵ No longer is *some* evidence required to uphold a finding of lack of domiciliary intent. None at all is required.

It thus appears, as Mr. Justice Rutledge feared, that any kind of a record will do for a denial of validity to the sister-state decree. The Court will not

21. Mr. Justice Rutledge, dissenting, *id.* at 246.

22. Mr. Justice Jackson, dissenting in *Rice v. Rice*, 336 U. S. 674, 676 (1949).

23. Dissenting in *Williams v. North Carolina*, 325 U. S. 226, 248 (1945).

24. *Rice v. Rice*, 134 Conn. 440, 58 A.2d 523 (1948).

25. Rheinstein, *Domicile as Jurisdictional Basis of Divorce Decrees*, 23 CONN. B. J. 280, 289 (1949).

“retry the facts.” It adheres to “unitary domicile” and to the “jurisdictional fact” theory. It thus, in his judgment, abdicated its functions under the full faith and credit clause. But Mr. Justice Rutledge refused to concur in the abdication. He thought a “major operation . . . required to prevent it,”²⁶ and he was ready to take his part in the surgery.

It should not be supposed that Mr. Justice Rutledge was insensitive to the legitimate concern of a state over the marital status of its residents. “One could understand and apply, without decades of confusion,” he said, “a ruling that transient divorces, founded on fly-by-night ‘residence,’ are invalid where rendered as well as elsewhere; in other words, that a decent respect for sister states and their interests requires that each, to validly decree divorce, do so only after the person seeking it has established connections which give evidence substantially and objectively that he has become more than casually affiliated with the community.”²⁷ Again, “It is hard to see what legitimate substantial interest a state may have in providing divorces for persons only transiently there or for newcomers before they have created, by reasonable length of stay or other objective standards, more than fly-by-night connections.”²⁸

The problem, thus, is to find appropriate criteria which will recognize the legitimate concerns of states with conflicting policies, apply them, and then require obedience to the command of the Constitution. Boldly, he put his finger on the vulnerable point of the entire structure, domicile.

Domicil, as a substantive concept, steadily reflects neither a policy of permanence nor one of transiency. It rather reflects both inconstantly. The very name gives forth the idea of home with all its ancient associations of permanence. But ‘home’ in the modern world is often a trailer or a tourist camp. Automobiles, nation-wide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality. But, beyond this, ‘home’ in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay ‘either permanently or for an indefinite or unlimited length of time.’ No other connection of permanence is required. All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage, and undergoes the mental flash, in a moment he has created a new domicil though hardly a new home.

Domicil thus combines the essentially contradictory elements of permanence and instantaneous change. No legal conception, save possibly ‘jurisdiction,’ of which it is an elusive substratum, affords such possibilities for uncertain application. The only thing certain about it, beyond its uncertainty, is that one must travel to change his

26. Dissenting in *Williams v. North Carolina*, 325 U. S. 226, 255 (1945).

27. *Id.* at 256.

28. *Id.* at 261.

domicil. But he may travel without changing it, even remain for a lifetime in his new place of abode without doing so. Apart from the necessity for travel, hardly evidentiary of stabilized relationship in a transient age, the criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity.²⁹

For Mr. Justice Rutledge, the escape from this inherently contradictory and anomalous situation must be "forthright and direct." He was prepared to fix objective, discoverable standards as a substitute for "domicile" as the jurisdictional requirement for divorce. Domicile, he was convinced, must go. "The conception has outlived its jurisdictional usefulness unless caprice, confusion and contradiction are the desirable criteria and consequences of jurisdictional conceptions."³⁰ The years and cases since have not proved him wrong.

The proposal to abandon an old and cherished concept of the common law failed to evoke enthusiasm either from Mr. Justice Rutledge's brethren or from the profession. For notwithstanding Mr. Justice Black's protest that *Williams II* provided "a new constitutional concept of 'jurisdiction,' which itself rests on a newly announced federal 'concept of domicile,'"³¹ the domiciliary theory of divorce jurisdiction is almost as old as divorce litigation in common-law countries. It was Mr. Justice Rutledge's proposal to substitute for it something more usable that was new and startling—so startling, indeed, that cautious critics immediately resorted to the argument which, from time immemorial, has been used to block change: legislation is not the province of the courts.³² Mr. Justice Rutledge knew better. He knew that the question was not whether the Court should legislate, but what legislation it should create. Had his views become law, another peg would have been added to our federalism and a lot of dirty family linen laundered.

His "boldness," together with his intensely pragmatic approach to the practical politics of the law no doubt induced Mr. Justice Rutledge to go along with Mr. Justice Douglas' innovation of "divisible divorce" in *Esenwein v. Commonwealth ex rel. Esenwein*³³ and *Estin v. Estin*.³⁴ To be sure, divorce

29. *Id.* at 257-8.

30. *Id.* at 256.

31. Dissenting in *Williams v. North Carolina*, 325 U. S. 226, 277 (1945).

32. See Lorenzen, *Extraterritorial Divorce—Williams v. North Carolina II*, 54 YALE L. J. 799, 808 (1945).

33. 325 U. S. 279 (1945). This case was decided on the same day as *Williams II*. The Court held that Pennsylvania could continue to enforce a support order against a husband which had been entered prior to his *ex parte* Nevada divorce, because he had not acquired a bona fide domicile in the latter state. Mr. Justice Douglas concurred on the ground that a valid decree against a nonresident wife domiciled in Pennsylvania need not be given the effect in the latter state of terminating the husband's duty of support. "But I am not convinced" he said, "that in absence of an appearance on personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children." *Id.* at 282.

34. 334 U. S. 343 (1948). In this case, the husband was admittedly domiciled in

was made completely divisible by neither case,³⁵ but the jurisdictional distinction is made between decrees which alter marital status and those which deprive a woman of her right to support. Here there is no denying the legitimacy or the reality of the interest of the state of the nonresident divorced wife's domicile. That interest is recognized and the state is permitted to protect it, but not at the expense of bastardized children and bigamous spouses.

The rediscovery of the "divisible divorce" is a long step toward the solution of many problems which arise in our one nation of many sovereign states. It was necessary to ignore the implications of a number of earlier cases³⁶ and, in a sense, to disinter the unobjectionable aspects of *Haddock v. Haddock*,³⁷ thus giving considerable point to the *quaere* raised by Professor Cook at the time of the first *Williams* case³⁸ and that by Professor Bingham some years before.³⁹

The *Estin* policy has been criticized on the ground that it imposes "upon men the burden of two families when the courts of their domicile have determined they need not bear it."⁴⁰ This may be so, but it is not easy to discern the merits of a policy which permits men to throw off the burden of the family they have merely by getting a new domicile and a new family. The suggestion that the second domicile can constitutionally free them from the burden of supporting the first family and that third states can take their choice of families which he must support is hardly convincing.

But is the principle of the *Estin* case applicable only to *ex parte* decrees? If the parties are before the court, does the doctrine of *res judicata* as it exists

Nevada when he obtained an *ex parte* divorce, subsequent to a valid support order in New York. The New York court held that the support order survived the divorce. The Supreme Court refused to interfere. Mr. Justice Douglas, writing for the majority, again distinguished between the Nevada decree as determining status and as interfering with the right to support of the absent spouse. His opinion appears to have two facets, one, the legitimate nature of New York's interest in the support of its citizen and, two, the lack of jurisdiction of Nevada to deprive the absent spouse of her right to support under the New York decree. See Carey & MacChesney, *Divorces by the Consent of the Parties and Divisible Divorce Decrees*, 43 ILL. L. REV. 608, 614 *et seq.* (1948).

35. Both the *Esenwein* and *Estin* cases involved the question of survival of a *prior* support order after divorce. Complete divisibility, based on Mr. Justice Douglas' first ground in *Estin* (see note 34 *supra*) would permit the state of the wife's domicile to render a decree for alimony *after* the foreign divorce.

36. See, *e.g.*, *Atherton v. Atherton*, 181 U. S. 155 (1901); *Thompson v. Thompson*, 226 U. S. 551 (1913).

37. 201 U. S. 562 (1906). After an *ex parte* decree obtained by the husband in Connecticut where he was unquestionably domiciled, the wife whom he had previously deserted in New York obtained a limited divorce and alimony there. The Supreme Court affirmed. The distinction between the effect of the foreign decree in determining status and in terminating the right to support could explain the decision. See Paulsen, *Migratory Divorce: Chapters III & IV*, 24 IND. L. J. 25, 46 *et seq.* (1948).

38. Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L. J. 165 (1943).

39. Bingham, *The American Law Institute vs. The Supreme Court*, 21 CORNELL L. Q. 393 (1936).

40. Carey & MacChesney, *Divorces by the Consent of the Parties and Divisible Divorce Decrees*, 43 ILL. L. REV. 608, 616-617 (1948).

in the divorcing state become mandatory in the first state? Mr. Justice Rutledge's concurrences in *Sherrer v. Sherrer*⁴¹ and in *Coe v. Coe*⁴² are in line with his abandonment of domicile as a jurisdictional necessity for divorce. Thus where the defendant appears, aside from the rare bigamy prosecution, Mr. Justice Rutledge's position in *Williams II* has been all but formally vindicated.

If the suggestion that "unitary domicile" be abandoned as an outworn concept in the migratory divorce cases was a bold one, Mr. Justice Rutledge's little noticed suggestion for the solution of the equally delicate problem of child custody was equally so. For a century or so American courts have been paying lip service to the principle that in custody cases the best interests of the child must be the paramount consideration. No doubt, for the most part, the repetition in judicial utterances of this formula has been made with the best of intentions. It is hard to escape the impression, however, that notions of a bygone age have crept in subtly to affect the courts' judgment of what is in the best interests of the child.⁴³ Certainly the not uncommon practice of dividing custody of a child of tender years between two alienated and hostile parents is not in the best interests of the child, however such an arrangement might appeal to a court as a compromise between the devoted but neurotic parents. Probably the "part-time" child is the most unfortunate of all children so far as concerns its mental health and future happiness.⁴⁴ This is almost certain to be the case when relations between the parents have become so bad that divorce is accompanied or followed by kidnapping of the childish pawn and "an unseemly litigious competition between the states and their respective courts as well as between parents."⁴⁵

Such an unhappy situation was reflected in *Halvey v. Halvey*⁴⁶ when

41. 334 U. S. 343 (1948). After a Florida divorce where both Massachusetts husband and wife were before the court, the issue of the plaintiff's domicile was res judicata in Massachusetts, as it was in Florida, even though the question of domicile had not been challenged in the Florida proceedings.

42. 334 U. S. 378 (1948). After a Nevada decree where both Massachusetts husband and wife were before the court, the "wife" sought to enforce a prior Massachusetts support order. The state court gave her relief on the ground that the Nevada court did not have jurisdiction. This decision was reversed by the Supreme Court on the authority of *Sherrer v. Sherrer*. Here again, the question of the Nevada court's jurisdiction had not been raised in the proceedings there.

43. In *People ex rel. Sinclair v. Sinclair*, 91 App. Div. 322, 86 N. Y. Supp. 539 (1st Dep't 1904), a child of about three was awarded to the custody of the mother because of his tender years since it was concluded that this was necessary in the best interest of the child. Two years later, it was found that the child was no longer of such a tender age that his "best interest" required the mother's care. He was awarded to the father, by reason of his "paramount right" to the child's custody. *People ex rel. Sinclair v. Sinclair*, 47 Misc. 230, 95 N. Y. Supp. 861 (Sup. Ct. 1905).

44. See Davis, *Sociological and Statistical Analysis*, 10 LAW & CONTEMP. PROB. 700 (1942).

45. Mr. Justice Rutledge, concurring in *New York ex rel. Halvey v. Halvey*, 330 U. S. 610, 620 (1947).

46. 330 U. S. 610 (1947).

Mr. Justice Rutledge made the imaginative and appealing suggestion that the best interests of the child should be the controlling consideration, "not only for disposing of such cases as a matter of local policy, as it is in Florida and New York, but also for formulating federal policies of full faith and credit, as well as of jurisdiction and due process in relation to such dispositions."⁴⁷ Here Mr. Justice Rutledge carries to the constitutional level a theory and approach which some have long advocated as proper for cases which arise in the Conflict of Laws.⁴⁸ It is a break from conceptualism in its classical sense, and an attempt to evaluate competing policies in the light of their social utility. More, it is frank recognition that the regularity of the law may on occasion make demands on the courts less compelling than the regularity of the lives of human beings.⁴⁹ Not only the desires of parents who cannot get along with each other but the symmetry of constitutional theory must sometimes give way for the promotion of social values more important to civilization than either. Uniformity, certainty, and predictability are not lightly to be sacrificed, but for Mr. Justice Rutledge, they were imperfect means to an end. When their inadequacy became apparent, he was not afraid to improvise more appropriate devices.

II

No single doctrine of the Constitution has given birth to more subtle complexities than the full faith and credit clause and the apparently innocent Act of Congress implementing it. No justice in the Supreme Court's history can be said to have mastered all the technicalities of these provisions and the most capable justices have frequently been baffled by some of them. If one were to venture a guess as to the verdict of history, it probably could be said with considerable plausibility that Mr. Justice Rutledge occupied a place on one of the most distinguished benches in the life of the Republic. Nevertheless, the full faith and credit principles have puzzled the minds of all who grappled with them during his tenure. Divided courts, dissenting and concurring opinions were the rule rather than the exception in the technical decisions as well as in those where the policy issues were large and obvious. On any showing, Mr. Justice Rutledge made a record here for legal craftsmanship, exceeded by few if any of his predecessors, if we are permitted to judge on the basis of avoidance of fallacy and pitfall which often lead both lawyer and

47. *Id.* at 620.

48. *Cavers, A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Harper, *Policy Bases of the Conflict of Laws*, 56 YALE L. J. 1156 (1947).

49. *Cf.* Mr. Justice Jackson's dissent in *Williams v. North Carolina*, 317 U. S. 287, 324 (1942): ". . . I had supposed that our judicial responsibility is for the regularity of the law, not for the regularity of pedigrees."

judge into error. Moreover, he was ever wary lest technicality become sheer technicality, obliterating the policy of the principle involved.

A good example is his handling of the treacherous problem in *Angel v. Bullington*.⁵⁰ Not only did he cut through the confusing intermixture of *res judicata* and *Erie R. R.* doctrines of Mr. Justice Frankfurter's opinion, but he pointed out what apparently escaped both Justices Frankfurter and Reed, that the full faith and credit clause might solve the problem without resort either to *res judicata* as a federal rule, or to *Erie* as requiring a state rule. The Court had already held that the decision of a state court which under the state rule was *res judicata* must constitutionally be given the same effect in a federal court sitting in the same state.⁵¹ This being so, an examination of the decision of the North Carolina Supreme Court in the *Bullington* series⁵² discloses, as Mr. Justice Rutledge pointed out, that in its judgment the statute involved did "not outlaw substantive claims but only deprives the state courts of power to entertain them."⁵³ So interpreted, the North Carolina statute is neither "procedural" nor "substantive" in the sense of *Erie v. Tompkins* or, for that matter, any other sense. It is a limitation on the power of state courts to hear and decide. Given the same effect by the federal court, it would leave untouched the power of such court to hear and determine Bullington's substantive right to a deficiency judgment against his debtor. When all is said and done about *Bullington*, Mr. Justice Frankfurter's opinion still leaves unanswered the question why either *res judicata* or *Erie* demands repudiation of a ninety-year-old rule,⁵⁴ to say nothing of the application of full faith and credit.

*Morris v. Jones*⁵⁵ gives us the full faith and credit rule in its most intricate form. Mr. Justice Rutledge wrote no opinion but he did not fall into the trap which snared his brother Douglas and five other colleagues. This case involved the validity of a ruling by an Illinois court rejecting a claim in liquidation proceedings based upon a Missouri judgment. Chicago Loyds, an "unincorporated association," had been authorized by the State of Illinois to conduct an insurance business in Illinois and in other states. An action for damages for malicious prosecution and false arrest was initiated against it in Missouri, where the concern was doing business. Before judgment in this action, a liquidator was appointed by an Illinois court under Illinois statutes

50. 338 U. S. 183 (1947).

51. See *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932).

52. *Bullington v. Angel*, 220 N. C. 18, 16 S. E.2d 411 (1941).

53. Mr. Justice Rutledge, dissenting in *Angel v. Bullington*, 330 U. S. 183, 201 n. 2 (1947).

54. In *Hyde v. Stone*, 20 How. 170, 175 (U. S. 1858), Mr. Justice Campbell said that "this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe modes of redress in their courts, or which regulate the distribution of their judicial power."

55. 329 U. S. 545 (1947).

regulating the insurance business. In appointing the liquidator, the court fixed a time for filing of claims and issued an order staying all suits pending against the firm. Notwithstanding actual notice of this order and the withdrawal of the company's attorney pursuant to the direction of the Illinois court, Morris prosecuted his tort action in Missouri and obtained a default judgment. After presentation of this judgment claim, denial by the statutory liquidator in Illinois, and affirmance by the Supreme Court of Illinois, Morris got to the Supreme Court of the United States. Mr. Justice Douglas, speaking for the Court, held that Illinois had failed to give that faith and credit to the Missouri judgment which Section 1 of Article 4 of the Constitution requires. Justices Frankfurter, Rutledge and Black thought otherwise. The majority regarded the question with oversimplicity: since the judgment obtained by Morris in Missouri was "final" there, it had to be "final" in Illinois. The result is ludicrous. If Morris had obtained his judgment after the appointment of a "liquidator" in Missouri, it would not have had the character of "finality" there. On the other hand, if Morris had obtained his judgment in Illinois, it would have lacked "finality" in the Illinois liquidation. But by obtaining it in Missouri and presenting it to an Illinois liquidator, it is "final" at its face value. Thus the Constitution of the United States requires that the Missouri judgment creditor receive better treatment in Illinois than he would receive in his own state and better than Illinois judgment creditors receive in their state. The only combination of judgments and liquidations which can produce this novel result is a judgment in one state and liquidation in another, each state giving the foreign creditor an advantage over local creditors.

The trouble lies in faulty analysis. The Constitution and Act of Congress require that the judgments of the courts in one state to be given the same faith and credit in a sister state as they have by "law or usage" in the courts of the state in which they were rendered. Cast in terms of the problem involved in *Morris v. Jones*, this rule creates an odd situation. How can the Illinois court give the Missouri judgment the same effect in an Illinois liquidation proceeding that it has in Missouri? Does this require the Illinois court to decide the case before it in the same way that a Missouri court would decide it on the identical facts?⁵⁶ It at once appears that this is impossible because the same facts in a Missouri court, *i.e.*, a prior Missouri judgment presented to an Illinois liquidator, could not arise. Does it mean that the Illinois liquidation proceedings must deal with a prior Missouri judgment in the same way that Missouri liquidation proceedings would deal with a prior Illinois judgment? If so, the "law or usage" to which the forum is referred would include the

56. For discussion of problems of this kind, see Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COL. L. REV. 330, 337 *et seq.* (1944); Dutton, *Characterization, Res Judicata and the Lawyers' Clause*, 22 IND. L. J. 201 (1947).

Missouri Conflict of Laws rule, and the full faith and credit clause together with the Act of Congress would raise the most logically intolerable problem of all, the *renvoi*.⁵⁷ For presumably the statute would require from the Missouri courts what it demands from the Illinois courts and we find ourselves at once involved in that endless oscillation, to Missouri and from Illinois, which leads only to interminable chaos or chaotic termination. Finally, does the rule mean that the Illinois courts must treat the Missouri judgment in the same way that the Missouri courts would treat the same judgment in liquidation proceedings there? This seems to be about the only thing the rule can mean and make sense. If it does, then clearly the decision of the Court is wrong because it is not disputed that the Missouri courts in liquidation proceedings would have done no better by Morris than the Illinois courts did.⁵⁸

If we examine this situation from the point of view of state policy what do we find? The usual full faith and credit dilemma of the policy of one state giving way to that of another? We find nothing of the kind. On the contrary, we find the policy of both states to be the same, with the result that the Constitution requires whichever forum the case arises in to subvert the policy of both. The policy of Illinois in liquidation proceedings is equality of distribution of assets. Foreign and local creditors are treated alike within their priority classification. Missouri has the same policy.⁵⁹ But now, instead of the earlier evil of one state seeking to give an advantage to local as against foreign creditors, we have the singular result that they must give foreign creditors an advantage over local ones, all in the name of full faith and credit.

A different but similarly complicated problem got a majority of the Court, but not Mr. Justice Rutledge, into difficulty in the *Magnolia Petroleum Co.* case.⁶⁰ Five members of the Court held that an injured workman could not obtain compensation in the state of his domicile after a previous award in the state where he was injured even though the amount of the latter award was

57. See Cheatham, *supra* note 56, at 338.

58. See McDonald v. Pacific States Life Ins. Co., 344 Mo. 1, 124 S. W.2d 1157 (1939).

59. "We believe that the weight of authority is that the assets of insolvent insurance companies should be treated as a unit, and disposed of for the benefit of all creditors ratably without regard to the locations of the assets or the residence of creditors. . . . Our [Missouri] statutes . . . provide a complete method for the dissolution of insolvent insurance companies. They provide for the equitable and ratable distribution of the assets to all the creditors without regard to . . . residence of creditors." McDonald v. Pacific State Life Ins. Co., 344 Mo. 1, 12, 124 S. W.2d 1157, 1163 (1939).

Although Mr. Justice Douglas insisted that there was no issue of "priority of claims against the property of the debtor" nor "of parity of treatment of creditors," 329 U. S. 545, 548 (1947), the Illinois legislation was accurately described by Mr. Justice Frankfurter as providing "a fair sifting process for determining the amount of claims against Illinois assets of an Illinois insurance company in liquidation in an Illinois court so as to secure equality of treatment for all who assert claims against such a fund." 329 U. S. 545, 561-62 (1947).

60. *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430 (1943).

deducted from the domiciliary award. The Court, per Chief Justice Stone, held that since the first award was final and conclusive of the plaintiff's rights in the state where rendered, full faith and credit required the same result in the second state. Thus, Texas (the state of injury) blocked Louisiana (the state of domicile) from giving its citizen the benefit of its more generous provision for injured workmen.

Oddly enough, the Chief Justice had taken a different position ten years earlier in *Yarborough v. Yarborough*, where the state in which a child had subsequently acquired domicile sought to impose an additional obligation of support on a father who had complied with a prior decree of another state which had the effect there of being the final measure of his alimentary duty.⁶¹ The divorce and support decree had been rendered in Georgia where all the parties were, at the time, domiciled. The second support decree was rendered in South Carolina where the father had property and where the child at that time was domiciled. After commenting on the unusual feature of the Georgia law which so tied its own hands as "to foreclose all future inquiry into the duty of maintenance however affected by changed conditions," the Chief Justice continued, "Even though the Constitution does not deny to Georgia the power to indulge in such a policy for itself, it by no means follows that it gives Georgia the privilege of prescribing that policy for other states in which the child comes to live."⁶² Much emphasis was placed by the Chief Justice on the interest the domiciliary state had in providing for the welfare of its infant residents. Moreover, although he conceded the Georgia decree was affective to govern the rights of the party in *Georgia*, he found "nothing in the decree itself, or in the history of the proceedings which led to it, to suggest that it was rendered with any purpose or intent to regulate or control the relationship of parent and child, or the duties which flow from it, in places outside the State of Georgia where they might later come to reside."⁶³

So, in his dissent in *Magnolia*, Mr. Justice Black, with Justices Rutledge, Douglas, and Murphy concurring, questioned the intent of the Texas decree to conclude the injured workman's right to additional compensation under the statute of his domicile, and doubted still further its power to do so if it had so intended.⁶⁴ Four years later, the Court backed away from the *Magnolia* decision.⁶⁵ Although there was a stipulation that the first award should not prejudice the workman's right to additional compensation in another state, the Court, in some way or other not made clear, based its decision in part on the ground that the first award was only *intended* to be final as to the workman's rights under the statute of that state.

61. *Yarborough v. Yarborough*, 290 U. S. 202, 213 (1933), Stone, C. J., dissenting.

62. *Id.* at 222-3.

63. *Id.* at 213.

64. 320 U. S. 430, 453-55 (1943).

65. *Industrial Comm'n v. McCartin*, 330 U. S. 622 (1947).

These cases, including the *Yarborough* decision, raise the difficult question whether the full faith and credit clause and the Act of Congress make it possible for one state, by *purporting* to do so, to close the door on another state which may then have, or in the future may acquire, an interest equal or superior to that of the first state so that the second state is helpless thereafter to apply its own policy. The problem is bound to bob up again and the most likely situation may be the next chapter in the unfolding story of "divisible divorce." May a state, which is the domicile of the wife at the time of the divorce or which becomes her domicile subsequently, impose a duty or an additional duty on the ex-husband to support her, and will the answer be different if she is a party to the divorce proceedings?⁶⁶ It is not inconceivable that the decreeing state may intend only to determine the husband's duty under its law and not universally or, if it intends otherwise, it may lack constitutional power so sweepingly to tie the hands of all other states.

The full faith and credit clause, like all other constitutional provisions, must be interpreted in the light of the history of the common law and our entire system of jurisprudence. This, of course, includes the principles of Conflict of Laws. Mr. Justice Rutledge respected the historical policies reflected in Conflict of Laws distinctions and gave them consideration in his judgments in the application of the constitutional rule. Among these is the policy of allowing to each state latitude in determining the time within which actions in its courts may be instituted. This is an ancient and important policy. The Supreme Court early concluded that the full faith and credit rule should not be interpreted in a manner which would interfere with such policy.

It would be strange, if in the now well understood rights of nations to organize their judicial tribunals, according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their

66. It will be remembered that in *Coe v. Coe*, 334 U. S. 378 (1948), the wife appeared in the Nevada proceedings which occurred after a Massachusetts support order. The Massachusetts court thereafter rendered a decree enforcing the support order on the grounds that the Nevada court had lacked jurisdiction. The Supreme Court reversed on grounds of *res judicata*, following *Sherrer v. Sherrer*. The Massachusetts court gave no indication that the local support order would have survived if the Nevada decree had been valid.

In *Lynn v. Lynn*, 275 App. Div. 269, 88 N. Y. S.2d 791 (1st Dep't 1949), a New York wife had appeared in a Nevada proceeding but the issue of support was not litigated. It was held that the Nevada decree did not affect a prior New York support order nor the power of the New York court to increase the amount of such order.

An Ohio case has held that an original alimony decree may be rendered at the wife's domicile after a sister-state divorce where, although both parties were present, the issue of support was not litigated. *Metzger v. Metzger*, 32 Ohio App. 202, 167 N. E. 690 (1929). Cf. *Bates v. Bodie*, 245 U. S. 520 (1918), where the support issue had been litigated.

On some of the potentialities of the completely divisible divorce, see *Carey & MacChesney, Divorces by the Consent of the Parties and Divisible Divorce Decrees*, 43 ILL. L. REV. 608, 618 (1948); and see 47 COL. L. REV. 1069 (1947).

courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.⁶⁷

It is clearly just as much a "thing of policy" for a state to determine the time within which suits or actions shall be brought as it is to determine "the time after which suits or actions shall be barred." Nevertheless this policy was denied the state of South Dakota, Justices Rutledge, Black, Murphy, and Douglas dissenting, in as fuzzy an application of the full faith and credit doctrine as has yet been made. South Dakota had a statute of limitations of six years for commencing actions on contracts. It had another statute, making void contractual provisions which imposed a shorter limitation. In *Order of United Commercial Travelers v. Wolfe*,⁶⁸ the Supreme Court held that South Dakota could not apply these statutes to an action brought in the South Dakota courts by a South Dakota citizen on a contract of insurance made and to be performed in South Dakota. Since the defendant was a fraternal benefit society, incorporated under the laws of Ohio, a six-month limitation in its constitution, valid under Ohio law, must receive full faith and credit. As Mr. Justice Burton put it, ". . . under such circumstances, South Dakota, as the state of the forum, was required by the Constitution of the United States, to give full faith and credit to the public acts of Ohio under which the fraternal benefit society was incorporated. . . ."⁶⁹

This odd result was said to depend, in some way not made clear, on the nature of the relationship of the members of a fraternal benefit society. The mysterious "indivisible unity" which characterizes such associations was thought to require suspension of the right of a state to apply its own policy as to limitation of actions, not so much in favor of the policy of a sister state, as of the defendant society.⁷⁰ Mr. Justice Black found no evidence that the insurance business of a fraternal company is conducted differently in any important way from that of a mutual, reciprocal, or joint stock company.⁷¹ Mr. Justice Burton, however, thought the members of such societies, "interwoven with their financial rights and obligations, . . . have other common interests incidental to their memberships, which give them a status toward one another that involves more mutuality of interest and more interdependence than arises from purely business and financial relationships."⁷² One searches the opinion and the authorities cited in vain to discover just how this fas-

67. *McElmoyle v. Cohen*, 13 Pet. 312, 327 (U. S. 1839).

68. 331 U. S. 586 (1947).

69. *Id.* at 589.

70. See Harper, *The Supreme Court and the Conflict of Laws*, 47 *COL. L. REV.* 883, 895 (1947).

71. 331 U. S. 586, 640 (1947) (dissenting opinion).

72. 331 U. S. 586, 605-6 (1947).

cinating "status" of the members of fraternal benefit societies conducts full faith and credit lightning to South Dakota's power to determine the period within which South Dakota contracts may be enforced in South Dakota courts by South Dakota citizens.

The most recent inroad on a state's right to apply its own policy as to the bringing of actions in its courts was in *Union National Bank v. Lamb*,⁷³ Mr. Justice Rutledge again dissenting. This time, for practical purposes, only Mr. Justice Black joined him.⁷⁴ Action was brought in a Missouri court on a Colorado judgment which had been "revived" more than ten years after rendered. A Missouri statute forbade actions on judgments after ten years from the time rendered or revived and forbade revival after ten years from the time of rendition. The Missouri court dismissed the action. The Supreme Court reversed on the ground that *Roche v. McDonald*⁷⁵ was "dispositive of the merits." The case was made to turn on the question whether, *under Colorado law*, the "revival" there created a "new" judgment, entitled to full faith and credit in Missouri or whether the revivor "did no more than to extend the statutory period in which to enforce the old judgment."

It is, of course, not only inappropriate but unsafe to speculate on the reasons for the dissent of a justice who gives no reasons for it. It seems clear here, however, that the technicality which distinguishes a "new" from a "revived" judgment did not appear persuasive to Mr. Justice Rutledge. In any event there are those to whom the distinction appears inadequate as a basis for narrowing the latitude allowed to a state to apply the important policy of its own statute of limitations. As for *Roche v. McDonald*, the situation is entirely different. One hardly need split a hair to distinguish between an action on a sister-state judgment, admittedly within the statutory limitations of the forum, and an action on a judgment originally rendered in another

73. 337 U. S. 38 (1949).

74. Justices Rutledge and Black wrote no opinion. Mr. Justice Frankfurter wrote what was technically a dissenting opinion. *Id.* at 45. He could not determine from the opinion of the Missouri court whether it did or did not regard the Colorado judgment as one of revivor or a "new" judgment, and he thought the Supreme Court should not initiate "an independent examination of Colorado law." *Id.* at 48. Moreover he could not determine that the Missouri court did not think it immaterial and that some non-federal ground was not the basis of the decision. He thus wanted to vacate the judgment and remand. Mr. Justice Douglas, for the majority, reversed because he thought the Missouri court placed revived judgments on the same basis as original judgments, regardless of whether such a judgment under Colorado law is treated as "new." The effect of both views is a remand for the Missouri court to pass on the question whether the Colorado revivor proceedings result in a "new" judgment, as to which *Roche v. McDonald* will be "dispositive."

75. 275 U. S. 449 (1928). In this case the judgment had been first rendered in Washington. After the statute of limitation had run in that state, the judgment creditor obtained a judgment on the Washington judgment in Oregon. He later sued in Washington on the Oregon judgment. An adverse judgment in Washington was reversed by the Supreme Court which held that the Oregon judgment was entitled to full faith and credit.

state many years before the forum's period of limitation and whose present extra-state efficacy depends upon the conceptual distinctions between "revival" and a "new" judgment.

The full faith and credit clause and the Congressional action under it demand a "lawyer's lawyer." To utilize it effectively requires a high degree of technical skill and "know how." It also demands statesmanship. It is, indeed, like the commerce clause, a powerful and effective instrument to maintain the delicate balance which our federal system must have. Both craftsmanship of a high order and depth of wisdom are necessary to apply and withhold its mandate appropriately.

A study of Mr. Justice Rutledge's contributions in the solution of the vexing problems which arise under full faith and credit eloquently confirm the appraisal quoted at the beginning of this article, now sadly to be phrased in the past tense. He was bold, willing to innovate, did not shrink from broad responsibility, and would not have the Court abdicate its powers.