III

The Constitutional Position of the States

NOTE

The subject of *The Proprietors of the Charles River Bridge* v. *The Proprietors of the Warren Bridge* is the contract clause of the Constitution. It was decided in 1837 after John Marshall's death. Roger Taney was Chief Justice.

Article I, § 10, of the Constitution in part provides that 'No state shall . . . pass any . . . law impairing the obligation of contracts.' Debate on this clause, both in the convention of 1787 and in the ratifying conventions, was not extensive. It is clear that the clause was intended to protect those property rights based upon and guaranteed by contract.

The first important statement of the United States Supreme Court on the meaning of the contract clause was made in *Fletcher* v. *Peck*,[1] decided in 1810. In 1795, the legislature of Georgia sold some thirty-five million acres of public land to four speculating land companies. The sale was not in itself evil. What irritated the people was the general legislative corruption attending the sale and the fact that the recent invention of the cotton gin had enhanced the value of cotton-bearing soil. As a consequence, the succeeding legislature annulled the grant. The state courts were forbidden 'to receive any evidence of title of any kind whatever to lands from the grantees under the "usurped act."'[2] Under the Eleventh Amendment it was impossible for a disgruntled investor to sue the state in a federal court.

John Peck of Boston had dealt heavily in Georgia lands. In 1803 he sold fifteen thousand acres of his holdings to Robert Fletcher of New Hampshire for three thousand dollars. On the basis of diversity of citizenship, Fletcher then sued Peck in a federal court for the recovery of the purchase money. The case finally reached the Supreme Court where it was decided that the original grant was a contract and that the grant had been impaired by the rescinding statute. This was a broad interpretation of the contract clause, since it would seem that the framers of the Constitution intended the clause to apply to private contracts, that is, to contracts between private parties and not to agreements to which the state was a party.

The second important contract clause decision of the Supreme Court came in *Trustees of Dartmouth College* v. *Woodward*.[3] Dartmouth College was established in 1769. Its charter, granted by the Crown, provided for a board of trustees which was empowered to elect a president and to fill vacancies in its membership. In 1816, the New Hampshire legislature amended the charter so

[1] 6 Cranch 87.

[2] See Beveridge, Albert J., *The Life of John Marshall*, Boston, 1929, III, p. 564.

[3] 4 Wheat. 518 (1819).

as to place the institution under state control and changed its name to Dartmouth University. The trustees under the original charter refused to recognize the validity of the 1816 enactment, but the Court of Appeals of New Hampshire decided against them. The court declared that the contract clause was 'intended to protect private rights only,'[4] and not to limit the power of the states over their own civil institutions. The college was a public organization and thus subject to control by the legislature. Appeal to the United States Supreme Court brought a reversal. Chief Justice Marshall, speaking for the Court, held the college to be a private institution. What was more important, the Court decided for the first time that a charter of incorporation was a contract.

In *Fletcher* v. *Peck* and the Dartmouth College Case the Supreme Court construed broadly the scope of the contract clause. Both opinions contain good Federalist doctrine, namely, the sanctity of private property or the irrevocable nature of contract.

In 1785 Thomas Russell and others petitioned the Massachusetts legislature for a charter of incorporation in order that a bridge might be built across the Charles river, connecting Charlestown and Boston. The petition set forth 'the inconvenience of the transportation by ferries, over Charles river, and the public advantages that would result from a bridge.'[5] The charter was granted, a bridge was to be built and tolls exacted for forty years, at the expiration of which time the bridge would become the property of the state.

The Charles River Bridge was a successful business venture. 'Shares,' says Swisher, 'which had a par value of $333.33 sold in 1805 at $1,650 and in 1814 at $2,080.' He adds that '[w]hereas the original capitalization had been $50,000, the bridge company in 1823 claimed that the value of its property was $280,000.'[6]

In the meantime, Boston was growing. In 1792, the legislature granted a charter to another bridge company over the protests of the proprietors of the Charles River Bridge. Apparently, to mollify the proprietors the legislature extended the life of their charter to seventy years from the date of the opening of the bridge, 17 June 1786.

Then in 1828 the legislature incorporated 'The Proprietors of the Warren Bridge' for the purpose of building another bridge across the Charles. On the Boston side, the Charles and Warren Bridges were 825 feet apart, while on the Charlestown side the distance between them was only 264 feet. The Warren Bridge 'was to be surrendered to the state, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not in any event to exceed six years from the time the company commenced receiving toll.'[7] Thenceforth it was to be a free bridge.

The Charles River Bridge Company thereupon filed a bill in the Supreme Judicial Court of Massachusetts against the proprietors of the Warren Bridge, first for an injunction to prevent the erection of the bridge, and after the bridge

[4] Quoted in Wright, Benjamin F., *The Contract Clause of the Constitution*, Cambridge, 1938, p. 41.
[5] 11 Pet. 420, 536.
[6] Swisher, Carl Brent, *Roger B. Taney*, New York, 1935, p. 362.
[7] 11 Pet. 420, 427.

was built, for general relief, contending that the legislature in authorizing the Warren Bridge violated the contract clause of the Constitution. The Massachusetts Court dismissed the bill. The Charles River Bridge Company then appealed on a writ of error to the United States Supreme Court under the twenty-fifth section of the Judiciary Act of 1789.

PROPRIETORS OF THE CHARLES RIVER BRIDGE v. PROPRIETORS OF THE WARREN BRIDGE

11 Peters 420 (1837)

MR. CHIEF JUSTICE TANEY . . .

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of 'The Proprietors of the Charles River Bridge'; and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the state, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of the Proprietors of the Stourbridge Canal against Wheely and others, the court say, 'the canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction, in all such cases, is now fully established to be this; that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act.' And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one, as could well be imagined, for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal, were expressly secured by the act of parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed '*through any one or more of the locks*,' and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labours, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system

of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the states, more unfavourable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction in favour of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavourably to the public, and to the rights of the community, than would be done in a like case in an English court of justice. . . [Here follows a brief discussion of several cases, the chief of which, *Providence Bank* v. *Billings*, 4 Pet. 514, 7 L. Ed. 939 (1830), decided that a charter incorporating a bank with the usual powers carried with it no exemption from state taxation upon the banking business.]

The case now before the court is, in principle, precisely the same. It is a charter from a state. The act of incorporation is silent in relation to the contested power. The argument in favour of the Proprietors of the Charles river bridge is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the state, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot, depend upon the circumstance of its having been [exercised] or not.

It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth; new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a state has surrendered for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass; the community have a right to insist, in the language of this court above quoted, 'that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the state to abandon it does not appear.' The continued existence of a government would be of no great value, if, by im-

plications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court, was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the state, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles river bridge. . .

The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles river bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren bridge would have done them any injury, or in any degree affected their right of property; if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show, that the legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated that contract by the erection of the Warren bridge.

The inquiry then is, does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the state; unless it shall appear by plain words, that it was intended to be done. . .

[The court then discussed the act of 1792 which extended the term to 70 years and said that, by establishing another bridge at that time and by the terms of the act itself, the legislature asserted power to authorize improvements diminishing the profits of the Charles river bridge; the proprietors of that bridge could therefore not claim privileges in conflict with the law from which they derived their corporate existence, the original grant having expired in 1826.]

Indeed, the practice and usage of almost every state in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation, and travelling. In some cases, rail roads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the state. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither states, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws, never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.

And what would be the fruits of this doctrine of implied contracts on the part of the states, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous rail roads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling; and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in rail roads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be

put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another, had been made, no rail road or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results. . .

[*Judgment affirmed.*]

NOTE

In *Pacific States Telephone and Telegraph Co.* v. *State of Oregon* (1912) it was contended that by the adoption of the initiative and referendum Oregon's government was divested of its republican character, contrary to Article IV, section 4, of the Constitution. The Court dismissed the case for want of jurisdiction on the ground that whether or not the state's government was republican in form was a political question.[1]

In reaching decisions the courts of the United States are, upon occasion, presented with questions the answers to which are found in the actions or words of the political departments, namely, the Congress or the executive. Such questions are called political questions. The development of political questions has been the work of the courts and affords a clear manifestation of judicial restraint, self-imposed chiefly on grounds of expediency.

The Supreme Court has declared the following to be political questions: Does a state of war exist? When did a war begin and end? Does the jurisdiction of the United States extend to an island in the high seas? What is the status of a gentleman who claims to be a representative of a foreign power? Has the government of a foreign nation been recognized by the United States? Has the United States recognized the existence of a foreign state? Has a treaty been violated or terminated? Has a treaty been properly negotiated? Has a proposed amendment to the Constitution been ratified by a given state legislature? This list is not complete, but it serves to indicate that the doctrine of political questions relates largely to questions affecting the foreign relations of the United States.

In 1867, Russia ceded to the United States the territory of Alaska, the western limit of the cession being a line running midway through the Bering Sea in a north-south direction. In 1868, Congress by law provided that 'the laws of the United States relating to customs, commerce, and navigation be . . . extended to and over all the mainland, islands, and waters of the territory ceded to the United States' by Russia. The act provided further that 'it shall be unlawful for any person or persons to kill any otter, mink, marten, sable, or fur seal, or other fur-bearing animal, within the limits of said territory, or in the waters thereof. . .'

A British schooner owned by one Cooper was captured by a United States revenue cutter fifty-nine miles off the coast of Alaska. Cooper was charged with having hunted and killed seals in violation of the act of Congress. The vessel

[1] The leading case on the subject, *Luther* v. *Borden*, 7 How. 1 (1849), is discussed in the opinion of the Court which follows. A recent case relating to political questions is *Colegrove* v. *Green*, 328 U.S. 549 (1946). See also *Cook* v. *Fortson*, 67 S.Ct. 21 (1946).

was libelled in the district court at Sitka and condemned. Cooper then made application to the Supreme Court of the United States for a writ of prohibition [2] to restrain the enforcement of a sentence of forfeiture and condemnation on the ground that the United States did not have jurisdiction at the point of capture.[3]

The Supreme Court in *In re Cooper* [4] considered itself bound by the position assumed by the political departments in claiming jurisdiction over half the Bering Sea and thus held that the district court did have jurisdiction over the case and so denied the writ of prohibition.

In the meantime, the British government had protested against the claims of the United States. Adjustment of differences through diplomatic channels failed. The dispute was finally submitted to arbitration; this was in 1892, and over a year later an award was made unfavorable to the claims of the United States. In the midst of this controversy, it is hardly probable that a court of the United States would have handed down a decision undermining the position of its own government. Had the Supreme Court done so we should have had the anomalous situation of the judiciary pitted against the executive and legislative departments in a matter affecting international relations.

The doctrine of the separation of powers has been offered as the theoretical basis of political questions. A more valid basis would seem to be expedience. The practicality of the Court's decision in the Cooper case is obvious. 'The national will,' said District Judge Dietrick with reference to the recognition of Russia, 'must be expressed through a single political organization; two conflicting "governments" cannot function at the same time. By the same token, discordant voices cannot express the sovereign will of the American nation.' [5] As Justice McLean has said: 'if this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, *there would be an irreconcilable difference between the executive and judicial departments.* By one of these departments, a foreign island or country might be considered as at peace with the United States, whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.' [6] And as Chief Justice Taney declared in connection with the negotiation of treaties, 'it would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered. . .' [7]

[2] A common law writ which lies to an inferior court when that court is acting in excess of its jurisdiction.

[3] Territorial waters ordinarily extend to a line three miles from the low-water mark.

[4] 143 U.S. 472 (1892).

[5] The *Rogdai,* 278 Fed. 294 (1920).

[6] *Williams* v. *Suffolk Insurance Co.,* 13 Pet. 415, 420 (1839). Italics ours.

[7] *Doe* v. *Braden,* 16 How. 635, 657 (1853).

The courts, however, will assume jurisdiction over a controversy where private justiciable rights are involved, in spite of the presence of questions of extreme political significance. The Supreme Court held itself bound by the decisions of the political departments in the case of *In re Cooper,* yet as Chief Justice Fuller remarked: 'We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, since we have no more right to decline the jurisdiction which is given than to usurp that which is not given.'[8]

PACIFIC STATES TELEPHONE & TELEGRAPH CO. v. STATE OF OREGON
223 U.S. 118 (1912)

In error to the Supreme Court of the State of Oregon to review a judgment which affirmed a judgment of the Circuit Court for Multnomah County, in that state, enforcing a tax on the gross revenue of a domestic corporation.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a state has ceased to be republican in form and to enforce the guaranty of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practice of the Government from the beginning to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.

The case is this: In 1902 Oregon amended its constitution. This amendment while retaining an existing clause vesting the exclusive legislative power in a General Assembly consisting of a senate and a house of representatives added to that provision the following: 'But the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.' Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted, when approved by popular vote, should become the law of the State. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such

[8] 143 U.S. 472, 503 (1892).

reference to take place either as the result of the action of the legislature itself or of a petition filed for that purpose by a specified number of voters. . .

In 1903 . . . detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906 a law taxing certain classes of corporations was submitted, voted on, and promulgated by the governor in 1906 . . . as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, 2 per centum upon their gross revenue derived from business done within the State. Penalties were provided for non-payment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone & Telegraph Company, an Oregon corporation engaged in business in that State, made a return of its gross receipts, as required by the statute, and was accordingly assessed 2 per cent. upon the amount of such return. The suit which is now before us was commenced by the State to enforce payment of this assessment and the statutory penalties for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay, and the failure to make such payment.

The answer of the corporation contained twenty-nine paragraphs. Four of these challenged the validity of the tax because of defects inhering in the nature or operation of the tax. The defenses stated in these four paragraphs, however, may be put out of view, as the defendant corporation, on its own motion, was allowed by the court to strike these propositions from its answer. We may also put out of view the defenses raised by the remaining paragraphs based upon the operation and effect of the state constitution, as they are concluded by the judgment of the state court. Coming to consider these paragraphs of the answer thus disembarrassed, it is true to say that they all, in so far as they relied upon the Constitution of the United States, rested exclusively upon an alleged infirmity of the powers of government of the State, begotten by the incorporation into the state constitution of the amendment concerning the initiative and the referendum.

The answer was demurred to as stating no defense. The demurrer was sustained, and the defendant electing not to plead further, judgment went against it, and that judgment was affirmed by the Supreme Court of Oregon. . . The court sustained the conclusion by it reached, not only for the reasons expressed in its opinion but by reference to the opinion in a prior case (*Kadderly* v. *Portland*, 44 Oregon 118, 146), where a like controversy had been determined.

The assignments of error filed on the allowance of the writ of error are numerous. The entire matters covered by each and all of them in the argument, however, are reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of Art. IV of the Constitution, that 'The United States shall guarantee to every State in this Union, a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.' This being the basis of all the contentions, the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character. . .

In other words, the propositions each and all proceed alone upon the theory that

the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed, the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is, at one and the same time, one and the same government, which is republican in form and not of that character.

Before immediately considering the text of § 4 of Art. IV, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its powers and rights as a member of the national Government, and however all the departments of that Government may recognize such state government, nevertheless every citizen of such State, or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful existence of the State. Second. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a State and if such contention be thought well founded, to disregard the existence in fact of the State, of its recognition by all of the departments of the Federal Government, and practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government. And as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one, a right which by its very terms also implies the power to control the legislative department of the Government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority.

Do the provisions of § 4, Art. IV, bring about these strange, far-reaching, and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured, a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit

of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case—*Luther* v. *Borden,* 7 How. 1.

The case came from a Circuit Court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island and the conflict which was brought about by the effort of the adherents of that alleged government, sometimes described as 'the government established by a voluntary convention,' to overthrow the established charter government. The defendants justified on the ground that the acts done by them charged as a trespass were done under the authority of the charter government during the prevalence of martial law and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government and denied the legality of the charter government. In the course of the trial the plaintiffs, to support the contention of the illegality of the charter government and the legality of the voluntary government, 'although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers,' offered certain evidence tending to show that nevertheless it was 'the lawful and established government,' upon the ground that its powers to govern have been ratified by a large majority of the male people of the State of the age of 21 years and upwards and also by a large majority of those who were entitled to vote for general officers cast in favor of a constitution which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the State of Rhode Island. The Circuit Court rejected this evidence and instructed the jury that, as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, at the outset pointed out 'the novelty and serious nature' of the question which it was called upon to decide. Attention also was at the inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set aside the established government by recovering damages from the defendants for acts done by them under the authority of and for the purpose of sustaining such established government. On this subject it was said (p. 38):

'For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation, answerable as trespassers, if not in some cases as criminals.'

Coming to review the question, attention was directed to the fact that the courts of Rhode Island had recognized the complete dominancy in fact of the charter government, and had refused to investigate the legality of the voluntary

government for the purpose of decreeing the established government to be illegal, on the ground (p. 39) 'that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses, et cetera.' It was further remarked:

'This doctrine is clearly and forcibly stated in the opinion of the supreme court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority.'

Reviewing the grounds upon which these doctrines proceeded, their cogency was pointed out and the disastrous effect of any other view was emphasized, and from a point of view of the state law the conclusive effect of the judgments of the courts of Rhode Island was referred to. The court then came to consider the correctness of the principle applied by the Rhode Island courts, in the light of § 4 of Art. IV of the Constitution of the United States. The contention of the plaintiff in error concerning that Article was, in substantial effect, thus pressed in argument: The ultimate power of sovereignty is in the people, and they in the nature of things, if the government is a free one, must have a right to change their constitution. Where, in the ordinary course, no other means exists of doing so, that right of necessity embraces the power to resort to revolution. As, however, no such right, it was urged, could exist under the Constitution, because of the provision of § 4 of Art. IV, protecting each State, on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence, it followed that the guarantee of a government republican in form was the means provided by the Constitution to secure the people in their right to change their government, and made the question whether such change was rightfully accomplished a judicial question determinable by the courts of the United States. To make the physical power of the United States available, at the demand of an existing state government, to suppress all resistance to its authority, and yet to afford no method of testing the rightful character of the state government, would be to render people of a particular State hopeless in case of a wrongful government. It was pointed out in the argument that the decision of the courts of Rhode Island in favor of the charter government illustrated the force of these contentions, since they proceeded solely on the established character of that government, and not upon whether the people had rightfully overthrown it by voluntarily drawing and submitting for approval a new constitution. It is thus seen that the propositions relied upon in this case were presented for decision in the most complete and most direct way. The court, in disposing of them, while virtually recognizing the cogency of the argument in so far as it emphasized the restraint upon armed resistance to an existing state government, arising from the provision of § 4 of Art. IV, and the resultant necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a State could rely, to protect them from the wrongful continuance against their will of a government not republican in form, proceeded to inquire whether a tribunal existed and its character. In doing this it pointed out that, owing to the inherent political character of such a question, its decision was not by the Constitution vested in the judicial department of the Government, but was on the contrary exclusively committed to the legislative department by whose action on such subject the judiciary were

absolutely controlled. The court said (p. 42):

'Moreover, the constitution of the United States, as far as it has provided for an emergency of this kind and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

'The fourth section of the fourth article of the constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

'Under this article of the constitution it rests with congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.'

Pointing out that Congress, by the act of February 28, 1795 (1 Stat. 424, c. 36), had recognized the obligation resting upon it to protect from domestic violence by conferring authority upon the President of the United States, on the application of the legislature of a State or of the Governor, to call out the militia of any other State or States to suppress such insurrection, it was suggested that if the question of what was the rightful government within the intendment of § 4 of Art. IV was a judicial one, the duty to afford protection from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government. If this view were correct, it was intimated, it would follow that the delegation of authority made to the President by the act of 1795 would be void as a usurpation of judicial authority, and hence it would be the duty of the courts, if they differed with the judgment of the President as to the manner of discharging this great responsibility, to interfere and set at naught his action; and the pertinent statement was made (p. 43): 'If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order.'

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. We do not stop to cite other cases which indirectly or incidentally refer to the subject, but conclude by directing attention to the statement by the court, speaking through Mr. Chief Justice Fuller, in *Taylor* v. *Beckham, No.* 1, 178 U.S. 548, where, after disposing of a contention made concerning the Fourteenth Amendment and coming to consider a proposition which was necessary to be decided concerning the nature and effect

of the guarantee of § 4 of Art. IV, it was said (p. 578):

'But it is said that the Fourteenth Amendment must be read with § 4 of Art. IV, of the Constitution, providing that: "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." It is argued that when the State of Kentucky entered the Union, the people "surrendered their right of forcible revolution in state affairs," and received in lieu thereof a distinct pledge to the people of the State of the guarantee of a republican form of government, and of protection against invasion, and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the General Assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guarantee, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before us was granted under § 709 of the Revised Statutes to revise the judgment of the state court on the ground that a constitutional right was decided against by that court.

'It was long ago settled that the enforcement of this guarantee belonged to the political department. *Luther* v. *Borden,* 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it. . .'

It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different, that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary, in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court,

not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Dismissed for want of jurisdiction.

NOTE

In *Williams* v. *North Carolina*[1] the Supreme Court was faced squarely with the question whether North Carolina had power to refuse full faith and credit to a Nevada divorce decree because, contrary to the findings of a Nevada court, North Carolina found that no bona fide domicile had been acquired in Nevada.

The Constitution requires each state to give full faith and credit to the public acts, records, and judicial proceedings of every other state, and provides that 'Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.' By virtue of this authority, Congress has acted twice, in 1790 and again in 1804. These two acts, says Robert H. Jackson, 'constitute the entire contribution of Congress to the evolution of our law of faith and credit.'[2]

The act of 1790 provides that 'the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and the judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.' The second act relates to the exemplification of non-judicial records and prescribes their effect in terms similar to the first act.

The 'acts, records, and judicial proceedings' to which full faith and credit is accorded relate to legislative acts, ordinances, records of deeds, wills, births, marriages, contracts, and the decisions, decrees, and judgments of state courts in civil cases. Faith and credit does not require one state to enforce the criminal laws of another state.[3]

The 'acts, records, and judicial proceedings' of one state do not, by virtue of full faith and credit, operate of their own force in another state. The seller of furniture sues to collect his money from A and gets a judgment against him. Before the judgment can be executed, A moves to a neighboring state taking the furniture with him. The seller follows A with an authenticated copy of the judgment against A, but it is necessary for the seller to bring suit against A in a court where the authenticated judgment will be accepted *as evidence* and thus

[1] 325 U.S. 226 (1945).

[2] *Full Faith and Credit, The Lawyer's Clause of the Constitution*, New York, 1945, p. 9.

[3] *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265 (1888).

avoid the necessity of going into the merits of the case a second time. A may claim that the court in the first state had no jurisdiction or that the procedure was faulty; but if these defenses fail, the court of the second state will enforce the judgment. Full faith and credit declared Chief Justice Fuller, 'did not make the judgments of the states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other states. . .'[4]

If the court of the original proceeding had no jurisdiction to entertain the case, then any judgment it might render would not be given full faith and credit by the courts of other states.[5] The question of jurisdiction has brought complications, particularly in connection with divorce.

The courts of each state decide for themselves the question of such jurisdiction, and the United States Supreme Court 'keeps them within proper bounds.'[6]

In the first Williams case[7] the Supreme Court held that a divorce granted by Nevada, on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, *where Nevada's finding of domicile was not questioned* though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina.

In the second Williams case which follows, Nevada's finding of domicile *was* questioned.

WILLIAMS ET AL. v. NORTH CAROLINA
325 U.S. 226 (1945)

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review judgments of the Supreme Court of North Carolina, affirming convictions for bigamous cohabitation, assailed on the ground that full faith and credit, as required by the Constitution of the United States, was not accorded divorces decreed by one of the courts of Nevada. . .

The implications of the Full Faith and Credit Clause, Article IV, § 1 of the Constitution, first received the sharp analysis of this Court in *Thompson* v. *Whitman*, 18 Wall. 457. Theretofore, uncritical notions about the scope of that Clause had been expressed in the early case of *Mills* v. *Duryee*, 7 Cranch 481. The 'doctrine' of that case, as restated in another early case, was that 'the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced.' *Hampton* v. *M'Connel*, 3 Wheat. 234, 235. This utterance, when put to the test, as it was in *Thompson* v. *Whitman, supra*, was found to be too loose. *Thompson* v. *Whitman* made it clear that the doctrine of *Mills* v. *Duryee* comes into operation only when, in the language of Kent, 'the jurisdiction of the court in another state is not im-

[4] *Atchison, T. & S. F. R. Co.* v. *Sowers*, 213 U.S. 55 (1909).

[5] For a discussion of the power of a state court to inquire into the jurisdiction of the court of another state, see *Thompson* v. *Whitman*, 18 Wall. 457 (1874).

[6] Dodd, Walter F., 1945 *Supplement: Cases on Constitutional Law*, St. Paul, 1945, p. 34.

[7] *Williams* v. *North Carolina*, 317 U.S. 287 (1942).

peached, either as to the subject matter or the person.' Only then is 'the record of the judgment . . . entitled to full faith and credit.' 1 Kent, Commentaries (2d ed., 1832) * 261 n.b. The essence of the matter was thus put in what *Thompson* v. *Whitman* adopted from Story: '"The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory."' 18 Wall. 457, 462. In short, the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of 'comity.'

But the Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447-8. 'To give it the force of a judgment in another state, it must be made a judgment there.' *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 325. It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.

'It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction. . .' It was 'too late' more than forty years ago. *German Savings Society* v. *Dormitzer*, 192 U.S. 125, 128.

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. *Bell* v. *Bell*, 181 U.S. 175; *Andrews* v. *Andrews*, 188 U.S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams* v. *North Carolina*, [317 U.S. 287] *supra*, the jurisdictional requirement of domicil is freed from confusing refinements about 'matrimonial domicil,' see *Davis* v. *Davis*, 305 U.S. 32, 41, and the like. Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.

It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. . . But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned au-

thority, to ascertain the truth or existence of that crucial fact.

These considerations of policy are equally applicable whether power was assumed by the court of the first State or claimed after inquiry. This may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is inherent in the practical application of the concept of domicil in the context of our federal system. See *Worcester County Co.* v. *Riley*, 302 U.S. 292. . . What was said in *Worcester County Co.* v. *Riley, supra,* is pertinent here. 'Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries.' 302 U.S. 292, 299. If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power. The issue has a far reach. For domicil is the foundation of probate jurisdiction precisely as it is that of divorce. The ruling in *Tilt* v. *Kelsey*, 207 U.S. 43, regarding the probate of a will, is equally applicable to a sister-State divorce decree: 'the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased.' 207 U.S. 43, 53.

Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions *in rem*. *Williams* v. *North Carolina, supra,* at 297. But insofar as a divorce decree partakes of some of the characteristics of a decree *in rem*, it is misleading to say that all the world is party to a proceeding *in rem*. . . All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable.

But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a new domicil within the divorcing State would, in the proper functioning of our federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State.

The problem is to reconcile the reciprocal respect to be accorded by the members of the Union to their adjudications with due regard for another most important aspect of our federalism whereby 'the domestic relations of husband and wife . . . were matters reserved to the States,' *Popovici* v. *Agler*, 280 U.S. 379, 383-4, and do not belong to the United States. . . The rights that belong to all the States and the obligations which membership in

the Union imposes upon all, are made effective because this Court is open to consider claims, such as this case presents, that the courts of one State have not given the full faith and credit to the judgment of a sister State that is required by Art. IV, § 1 of the Constitution.

But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicil. 'It is not for us to retry the facts,' as was held in a case in which, like the present, the jurisdiction underlying a sister-State judgment was dependent on domicil. *Burbank* v. *Ernst,* 232 U.S. 162, 164. The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment.

What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose reexamination by another State. Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. *Thompson* v. *Whitman, supra.* If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we cannot upset the judgment before us. And we cannot do so even if we also found in the record of the court of original judgment warrant for its finding that it had jurisdiction. If it is a matter turning on local law, great deference is owed by the courts of one State to what a court of another State has done. . . But when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of a court of another State which finds an absence of domicil where such a conclusion is warranted by the record.

When this case was first here, North Carolina did not challenge the finding of the Nevada court that petitioners had acquired domicils in Nevada. For her challenge of the Nevada decrees, North Carolina rested on *Haddock* v. *Haddock,* 201 U.S. 562. Upon retrial, however, the existence of domicil in Nevada became the decisive issue. The judgments of conviction now under review bring before us a record which may be fairly summarized by saying that the petitioners left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as each had done so

and married one another they left Nevada and returned to North Carolina to live there together as man and wife. Against the charge of bigamous cohabitation under § 14-183 of the North Carolina General Statutes, petitioners stood on their Nevada divorces and offered exemplified copies of the Nevada proceedings. The trial judge charged that the State had the burden of proving beyond a reasonable doubt that (1) each petitioner was lawfully married to one person; (2) thereafter each petitioner contracted a second marriage with another person outside North Carolina; (3) the spouses of petitioners were living at the time of this second marriage; (4) petitioners cohabited with one another in North Carolina after the second marriage. The burden, it was charged, then devolved upon petitioners 'to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy' the jury from all the evidence, that petitioners were domiciled in Nevada at the time they obtained their divorces. The court further charged that 'the recitation' of *bona fide* domicil in the Nevada decree was 'prima facie evidence' sufficient to warrant a finding of domicil in Nevada but not compelling 'such an inference.' If the jury found, as they were told, that petitioners had domicils in North Carolina and went to Nevada 'simply and solely for the purpose of obtaining' divorces, intending to return to North Carolina on obtaining them, they never lost their North Carolina domicils nor acquired new domicils in Nevada. Domicil, the jury was instructed, was that place where a person 'has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time.'

The scales of justice must not be unfairly weighted by a State when full faith and credit is claimed for a sister-State judgment. But North Carolina has not so dealt with the Nevada decrees. She has not raised unfair barriers to their recognition. North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence.

State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. *Norris* v. *Alabama*, 294 U.S. 587, 590. This record is barren of such attempted evasion. What it shows is that petitioners, long-time residents of North Carolina, came to Nevada, where they stayed in an auto-court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live. It cannot reasonably be claimed that one set of inferences rather than another regarding the acquisition by petitioners of new domicils in Nevada could not be drawn from the circumstances attending their Nevada divorces. It would be highly unreasonable to assert that a jury could not reasonably find that the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina. Such an intention, the trial court properly charged, would preclude acquisition of domicils in Nevada. . . And so we cannot say that North Carolina was not entitled to draw the inference that petitioners never abandoned their domicils in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court.

If a State cannot foreclose, on review here, all the other States by its finding

that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a federal system in which regulation of domestic relations has been left with the States and not given to the national authority. But the occasional disregard by any one State of the reciprocal obligations of the forty-eight States to respect the constitutional power of each to deal with domestic relations of those domiciled within its borders is hardly an argument for allowing one State to deprive the other forty-seven States of their constitutional rights. Relevant statistics happily do not justify lurid forebodings that parents without number will disregard the fate of their offspring by being unmindful of the status of dignity to which they are entitled. But, in any event, to the extent that some one State may, for considerations of its own, improperly intrude into domestic relations subject to the authority of the other States, it suffices to suggest that any such indifference by a State to the bond of the Union should be discouraged, not encouraged.

In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage. The petitioners therefore assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada. Since the divorces which they sought and received in Nevada had no legal validity in North Carolina and their North Carolina spouses were still alive, they subjected themselves to prosecution for bigamous cohabitation under North Carolina law. The legitimate finding of the North Carolina Supreme Court that the petitioners were not in truth domiciled in Nevada was not a contingency against which the petitioners were protected by anything in the Constitution of the United States. A man's fate often depends, as for instance in the enforcement of the Sherman Law, on far greater risks that he will estimate 'rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.' *Nash* v. *United States,* 229 U.S. 373, 377. The objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law has more than once been overruled. In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State in punishing particular acts may provide that 'he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.' *United States* v. *Balint,* 258 U.S. 250, 252, quoting *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U.S. 57, 69-70. Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime.

We conclude that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domicils in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations. And, as was said in connection with another aspect of the Full Faith and Credit Clause, our conclusion 'is not a matter to arouse the susceptibilities of the States, all of which are equally concerned

in the question and equally on both sides.' *Fauntleroy* v. *Lum*, 210 U.S. 230, 238. . .

Affirmed.

[Dissenting opinions were presented by MR. JUSTICE RUTLEDGE and MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS joining in the dissent of MR. JUSTICE BLACK. CHIEF JUSTICE STONE and MR. JUSTICE JACKSON joined in a concurring opinion by MR. JUSTICE MURPHY.]