Full Faith and Credit and Section 1983: A Reappraisal

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FULL FAITH AND CREDIT AND SECTION 1983: A REAPPRAISAL

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42 U.S.C. section 1983 was drafted to provide a federal forum for litigants who Congress feared might not receive substantial justice from a state court. The implementing statute for the full faith and credit clause, 28 U.S.C. section 1738, provides that a state's preclusion rules should control matters originally litigated in that state. When a state court has decided, or could have decided, issues related to a subsequent 1983 action, the underlying purposes of sections 1983 and 1738 are in direct conflict. Recent Supreme Court decisions indicate that the Court may apply section 1738 strictly in such settings and adopt the state's preclusion rules. Strict application of section 1738 often will deny the section 1983 litigant access to federal court. Professor Smith discusses precedent and policy that support an exception to a per se application of full faith and credit based on the goals of section 1983. He argues that the recent Court decisions would support this exception and concludes that the Court should adopt a case-by-case analysis that evaluates five specific criteria. The purpose of this analysis is to weigh the underlying purposes of section 1983 against those of full faith and credit.

Within a court system, the principles of claim preclusion and issue preclusion[1] govern the effect of a completed judicial proceeding upon a subsequent action. These doctrines developed at common law to provide finality to the resolution of disputes, to conserve judicial resources, and to relieve parties of the burden of repetitious litigation.[2] Claim preclusion, commonly referred to

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1. This Article uses the terminology of the RESTATEMENT (SECOND) OF JUDGMENTS (1982) [hereinafter cited as RESTATEMENT] to describe the preclusive effects of prior judgments on later civil actions. The traditional terms, res judicata and collateral estoppel, still are employed by many courts to identify the claim preclusion and issue preclusion consequences of a judgment. The Supreme Court adopted the Restatement terminology in Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892, 894 n.1 (1984), although it subsequently used the terms "res judicata" and "collateral estoppel" in McDonald v. City of West Branch, 104 S. Ct. 1799, 1801 n.5 (1984), because the lower court had done so and it was "convenient" to use the same terminology in the Supreme Court decision. The Restatement terminology conveys more precisely the preclusion concepts under consideration. "Res judicata" has been used interchangeably to describe the general field of preclusion as well as the more particular concepts of merger and bar within claim preclusion. *See infra* note 3. The concept of "estoppel" also may be confusing in this context because parties may be "estopped" from asserting a position in litigation for reasons other than a prior judgment. For a discussion of these points, see RESTATEMENT, *supra*, Introduction at 1-5.

2. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980) ("As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple

as res judicata, provides that a final judgment may preclude later relitigation of claims and defenses that arose from the same transaction and that were raised, or could have been raised, in the first proceeding.[3] Under issue preclusion, or collateral estoppel, a decision on an issue of fact or law that is necessary to a court's judgment may preclude relitigation of the same issue in a suit on a different claim involving a party to the first action.[4]

Because claim and issue preclusion are common-law doctrines, the federal courts and each state court system are free to develop their own preclusion principles. The modern approach, exemplified by the federal court system and the Restatement (Second) of Judgments, has increased the use of both preclusion forms.[5] Because many states have retained traditional limitations on preclusion contrary to this modern trend, however, significant differences in the scope of the preclusion doctrine exist.[6]

"Full faith and credit" considerations arise when a second action is brought in either a different state court or in federal court. Neither the constitutional clause[7] nor its implementing statute[8] establish interstate preclusion rules. Instead, they provide that state and federal courts should apply the

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lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."). *See also* RESTATEMENT, *supra* note 1, Introduction at 11-12.

3. Allen v. McCurry, 449 U.S. 90, 94 (1980). Claim preclusion has two constituent principles—merger and bar. The general rule of merger is that a valid and final judgment in favor of a plaintiff will extinguish all claims that the plaintiff had against the defendant arising from the same transaction. *See* RESTATEMENT, *supra* note 1, § 18. The plaintiff may sue on the judgment, but he may not maintain a separate action on the original claim or any part thereof. A defendant's defenses also are merged in the judgment so that he cannot avail himself of defenses he might have interposed, or did interpose, in the first action. *Id.* The general rule of bar is that a valid and final judgment in favor of the defendant prohibits another action by the plaintiff on the same claim. *See id.* §§ 19-20. Both the merger and bar aspects of claim preclusion apply to claims and defenses that could have been litigated, but were not, as well as those that actually were litigated and determined. *Id.* § 18 comment a & § 19.

4. Allen v. McCurry, 449 U.S. 90, 94 (1980); RESTATEMENT, *supra* note 1, §§ 27-28.

5. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 349 (1971); RESTATEMENT, *supra* note 1, Introduction at 10.

6. For example, federal preclusion doctrine differs from that of many state courts in the mutuality required for application of issue preclusion. *Compare* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (defendant precluded from raising defense in private suit that had been raised unsuccessfully in SEC enforcement action) *and* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971) (finding of patent invalidity precluded plaintiff's later action against different alleged infringer) *with* Eliason Corp. v. Bureau of Safety and Regulation, 564 F. Supp. 1298 (W.D. Mich. 1983) (first suit against sheriff did not bar later suit against his deputies—lack of privity). Federal preclusion doctrine also differs in the breadth of the concept of "same claim" for claim preclusion purposes. *See* RESTATEMENT, *supra* note 1, § 24 comment a (1982); Ferriell, *Res Judicata in Ohio: Preclusion of Causes of Action or Claims?* 10 OHIO N.U.L. REV. 241 (1983).

7. U.S. CONST. art. IV, § 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

8. 28 U.S.C. § 1738 (1982). Section 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal

claim and issue preclusion rules of the state that decided the first action. Thus, if the rendering state would bar the subsequent action in its own courts, the second forum (whether another state or federal court) should bar the action despite its own, possibly differing preclusion doctrine.

The strict application of the full faith and credit doctrine, however, may interfere with strong policies or interests of the second forum, and on occasion full faith and credit has been deferred when the second forum's interests were considered paramount. For example, the Supreme Court has denied preclusive effect to state court judgments that interfered with another state's sovereignty over matters of particular local concern[9] and to judgments that conflicted with congressional grants of jurisdiction to the federal courts.[10]

This Article discusses the conflict between full faith and credit and the legislative purposes of the 1871 Civil Rights Act, in which Congress established both a federal remedy for violations of constitutional rights, section 1983,[11] and jurisdiction in the federal courts to hear such claims, section 1343.[12] The legislative history and subsequent judicial construction of sections 1983 and 1343 indicate that they were intended to create a "uniquely federal remedy"; state courts could not be trusted to vindicate the federal

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of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

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.

9. For a discussion of examples of full faith and credit yielding to substantive policies of the second forum, see *infra* text accompanying notes 156-206.

10. For a discussion of decisions in which full faith and credit was not accorded to state court judgments because of a conflict between the state judgment and a congressional scheme of federal remedies and jurisdiction, see *infra* text accompanying notes 207-242.

11. 42 U.S.C. § 1983 (1982). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

12. 28 U.S.C. § 1343 (1982). Section 1343 provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by an act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

rights the statutes sought to enforce.[13]

The specific conflict arises in federal litigation that follows a state court judgment ("state-federal" litigation). When a state court has made determinations that would be conclusive under that state's preclusion rules, is a federal court ever justified in permitting subsequent litigation under section 1983 because of its "uniquely federal" nature?

In *Allen v. McCurry*,[14] *Haring v. Prosise*,[15] and *Migra v. Warren City School District Board of Education*,[16] the Supreme Court has provided the framework for answering this question. The Court stated in *Allen* that section 1983 actions generally are subject to issue preclusion principles because the legislative purpose of section 1983 does not require or justify a blanket exception to full faith and credit.[17] *Migra*, the most recent Supreme Court decision, extended the ruling in *Allen* to apply claim preclusion to section 1983 actions as well and identified state law, rather than federal, as governing preclusion.[18] The Court indicated in *Haring*, however, that a federal court need not apply a strict state rule of preclusion in cases in which such an application would violate the " 'understanding of [section] 1983' "[19] regarding the special role of federal courts in enforcing federal rights.

Read together, *Allen*, *Haring*, and *Migra* suggest that the legislative intent of section 1983 may support case-by-case exceptions to state rules of preclusion. None of the decisions, however, develops a specific rationale for a section 1983 exception to full faith and credit or an explanation of what the scope and application of such an exception would be. Although *Haring* espoused a flexible view of full faith and credit, *Haring* appears at odds with portions of the *Migra* opinion and also with the Court's ruling one year earlier in *Kremer v. Chemical Construction Corp.*[20] The *Kremer* Court concluded that full faith and credit required strict application of state preclusion doctrine in federal employment discrimination actions under Title VII.[21]

The thesis of this Article is that strong policy and precedent support a more flexible application of full faith and credit principles in section 1983 litigation than the Supreme Court has recognized. The Article will demonstrate

13. In Mitchum v. Foster, 407 U.S. 225, 239-42 (1972), the Court noted:

> Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation . . . . [Congress] was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to vindication of those rights; and it believed that these failings extended to the state courts.

For a further discussion of the legislative histories and purposes of §§ 1983 and 1343, see *infra* text accompanying notes 241-68.

14. 449 U.S. 90 (1980).

15. 103 S. Ct. 2368 (1983).

16. 104 S. Ct. 892 (1984).

17. *Allen*, 449 U.S. at 104-05.

18. *Migra*, 104 S. Ct. at 897-98.

19. *Haring*, 103 S. Ct. at 2373 (quoting *Allen*, 449 U.S. at 101).

20. 456 U.S. 461 (1982).

21. *Id.* at 485.

that the Court has not strictly applied the constitutional and statutory provisions regarding full faith and credit in other settings in which the provisions conflicted with important state or federal policies of the second forum. The significant, well-established congressional intent behind section 1983—to provide a choice of federal or state forums—justifies an exception to rote application of the normal rules of preclusion in those instances in which the purpose of section 1983 is jeopardized by a per se preclusion rule.

This Article first analyzes the four recent Supreme Court decisions: *Allen*, *Kremer*, *Haring*, and *Migra*. It then reviews prior full faith and credit precedent to demonstrate the flexibility inherent in that doctrine. Finally, it presents a method of analysis for preclusion issues in section 1983 litigation that permits federal courts to deviate from state rules of preclusion to fulfill the legislative purposes of section 1983.

I. *ALLEN, KREMER, HARING,* AND *MIGRA*

Lower courts and commentators were divided over resolution of the dilemma posed by preclusion defenses in section 1983 litigation prior to the *Allen* decision.[22] On one hand, institutional pressures and doctrinal

22. *See, e.g.*, the decisions cited in *Allen*, 449 U.S. at 97 n.10 and in the court of appeals decision in McCurry v. Allen, 606 F.2d 795, 797-98 nn.2-9 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980). Almost all of the lower federal courts had concluded that § 1983 "presents no categorical bar to the application of res judicata and collateral estoppel concepts," *Allen*, 449 U.S. at 97; several courts had suggested that normal rules of claim preclusion should not apply. *Id.*

Because of the legislative purpose to provide a federal forum for the adjudication of the federal issues, most commentators concluded that § 1983 actions should be subject to special rules of preclusion. *See, e.g.*, Averitt, *Federal Section 1983 Actions After State Court Judgments*, 44 U. COLO. L. REV. 191 (1972) (federal courts should be able to rehear § 1983 cases without reference to res judicata in some circumstances); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. 2), 60 VA. L. REV. 250, 276 (1974) (discusses situations in which relitigation of § 1983 claims in federal court should be allowed; § 1738 not discussed as basis for analysis); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859, 878 (1976) (section 1738's language should not be read to bar relitigation of civil rights cases); Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185, 212 (1974) (principles of preclusion ordinarily should control and relitigation should not be allowed); Comment, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 U.C.L.A. L. REV. 177, 221-22 (1979) (recommends balance between conflicting policies in favor of res judicata and unencumbered access to federal court in § 1983 actions); Comment, *The Collateral Estoppel Effect to be Given State Court Judgments in Federal Section 1983 Damage Suits*, 128 U. PA. L. REV. 1471, 1504-08 (1980) (discusses *Allen* court of appeals decision; maintains that collateral estoppel from state criminal proceedings should not bar subsequent § 1983 action); Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 COLUM. L. REV. 610 (1978) (discusses relationship of §§ 1738 and 1983; supports structured exception for § 1983 from literal, statutory command of full faith and credit); *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135-36 & 1343 (1977) (discusses full faith and credit; concludes that when § 1983 litigant did not exercise his choice of forum, he should not be barred from bringing action in federal court); Note, *Exception to Preclusion Principles in Section 1983 Actions Brought to Vindicate Fourth Amendment Violations*, 11 SETON HALL L. REV. 136 (1980) (written after court of appeals decision in *Allen* and before United States Supreme Court review; advocates balancing interest in federal-state comity with federal interest in constitutional adjudication, but does not discuss § 1738); Note, *Relitigation of Fourth Amendment Claims Under Section 1983, Federalism and the Illusory Right to a Federal Forum*, 1980 U. ILL. L.F. 783 (1980) (section 1738 should preclude § 1983 litigants from bringing fourth amendment claims in federal court after the claims have been adjudicated in state court). *But see* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 349-50 (1978) ("The fashionable conclusion that § 1983 cases are exceptional for res judicata purposes is a product of

developments encouraged the use of preclusion doctrines to screen cases already heard in state court: the caseload of federal courts was growing rapidly, particularly in civil rights areas;[23] the Court was encouraging the use of comity-based doctrines of abstention and deference toward state proceedings;[24] and the Court had endorsed the expanded application of claim and issue preclusion in other than section 1983 cases.[25] On the other hand, preclusion seemed inconsistent with Supreme Court decisions which had established that the legislative purpose of sections 1983 and 1343 was to make a federal forum available, as an alternative to state court, to hear claims of deprivation of constitutional rights under color of state law.[26]

Prior to *Allen*, few courts or commentators considered the full faith and credit statute (section 1738) central to the analysis of preclusion questions in section 1983 actions.[27] The uncertainty regarding the role of section 1738 in state-federal litigation was created in part by Supreme Court decisions not involving section 1983 that were handed down in the two Court terms prior to *Allen*. For example, the Court had discussed section 1738 extensively in a case involving successive state proceedings for workers' compensation benefits.[28] In contrast, the Court had based its decisions on federal preclusion principles without reference to section 1738 or state law in two decisions involving claim preclusion defenses in state-federal litigation.[29] Furthermore, in opinions prior to *Allen*, the Court had referred to possible application of the preclusion

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wishful thinking"; federal courts should respect congressional command in § 1738 and apply state rather than federal rules of preclusion.).

23. In 1966 there were 218 civil rights actions brought by state prisoners in federal court. This number had increased to 12,540 by 1980. ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 62 (1980). *See* Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring); Comment, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. PITT. L. REV. 1035 (1982).

24. *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979) (Federal courts should abstain when federal suit would interfere with pending state juvenile proceeding in which federal claims could be raised.); Stone v. Powell, 428 U.S. 465 (1976) (Federal courts in habeas corpus proceeding may not reconsider state court rulings on fourth amendment issues.); Bellotti v. Baird, 428 U.S. 132 (1976) (abstention applied to allow state courts to construe ambiguous state abortion laws).

25. The Supreme Court permitted the offensive and defensive use of issue preclusion, without mutuality, to the fullest extent permitted by due process in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), and Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

26. Mitchum v. Foster, 407 U.S. 225 (1972) (*see supra* note 13). *See, e.g.*, McNeese v. Board of Educ., 373 U.S. 668 (1963) (Section 1983 plaintiff may have direct access to federal court without resorting to state administrative remedies.); Monroe v. Pape, 365 U.S. 167 (1961) (Section 1983 is a federal remedy that supplements state-law remedies; federal court is available as an alternative forum because state courts may not enforce fourteenth amendment rights.).

27. Section 1738 provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the court of such State, Territory or Possessions from which they are taken." 28 U.S.C. § 1738 (1982). Few of the lower court opinions involving § 1983 actions noted in *Allen* by the Supreme Court even mentioned § 1738, and none of them considered the statute dispositive. *Allen*, 449 U.S. at 97 n.10. Similarly, several of the articles on preclusion in § 1983 actions did not discuss § 1738, and those commentators who did address the statute were split on whether it should govern § 1983 actions. *See supra* note 22.

28. Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980). *See infra* text accompanying notes 183-206.

29. Brown v. Felsen, 442 U.S. 127 (1979); Montana v. United States, 440 U.S. 147 (1979).

doctrines to section 1983 actions without mentioning section 1738.[30]

A. Allen v. McCurry

The *Allen* decision established the proposition that state-federal litigation under section 1983 is subject to section 1738 and principles of issue preclusion.[31] The Supreme Court, however, did not determine the extent to which section 1738 mandates that state preclusion doctrine, rather than federal principles, must govern.

In *Allen*, plaintiff McCurry sued police officers under section 1983 for damages arising from an allegedly unconstitutional search of his home. In a previous criminal prosecution, a state court had denied McCurry's motion to suppress evidence seized in the search and had ruled that his fourth amendment rights had not been violated.[32] A federal district court granted summary judgment to defendant police officers in the subsequent section 1983 action on the basis of issue preclusion. The federal district court concluded that McCurry's fourth amendment claim had been litigated and determined against him in the state court suppression hearing.[33] The court of appeals reversed and held that issue preclusion should not be applied to a section 1983 claim raising search and seizure issues "because of the special role of federal courts in protecting civil rights," and because habeas corpus would be unavailable to McCurry as a means of federal review after *Stone v. Powell*.[34]

See infra text accompanying notes 220-24 (discussing *Brown*); text accompanying notes 235-42 (discussing *Montana*).

30. There was mention of the issue of preclusion in § 1983 actions and some *dicta* approving lower court application of preclusion in Ellis v. Dyson, 421 U.S. 426, 437 (1975); Preiser v. Rodriguez, 411 U.S. 475, 497, 509 n.14 (1973); Wilwording v. Swenson, 404 U.S. 249, 252 (1971); Perez v. Ledesma, 401 U.S. 82, 125 (1971). None of these cases, however, made any reference to § 1738 or full faith and credit principles.

31. *Allen*, 449 U.S. at 95-96, 105.

32. The state trial court "denied the suppression motion in part." *Id.* at 91. McCurry had moved to suppress all evidence seized by the police in their search of his apartment. The trial court ruled lawful the police entry and seizure of items in plain view, but ruled that the search of McCurry's dresser and of tires on his porch, without a warrant, exceeded the bounds of the fourth amendment. This ruling, as well as McCurry's conviction on drug possession and assault charges, was affirmed by the Missouri Court of Appeals in State v. McCurry, 587 S.W.2d 337 (Mo. Ct. App. 1979).

33. The district court construed McCurry's § 1983 complaint to question the police entry and search of his apartment, not merely the extension of the search beyond permissible limits. The court concluded that the validity of the entry and search for items in plain view had been determined in the portion of the state ruling that refused to suppress that evidence. McCurry v. Allen, 466 F. Supp. 514, 515 (E.D. Mo. 1978), *rev'd*, 606 F.2d 795 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980).

34. McCurry v. Allen, 606 F.2d 795, 779 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980). The court of appeals concluded that McCurry should have an opportunity for federal court consideration of his federal constitutional claim and that a § 1983 action was his only vehicle for such review after Stone v. Powell, 428 U.S. 465 (1976). *Stone* established that a state prisoner may not obtain reconsideration of fourth amendment claims in a federal habeas corpus proceeding if he has been provided a "full and fair opportunity" to litigate those issues in the state criminal prosecution. *Id.* at 481-82, 494. The court of appeals in *Allen* ruled that normal rules of preclusion should not apply in § 1983 suits raising such fourth amendment issues. *Allen*, 606 F.2d at 799, *rev'd*, 449 U.S. 90 (1980).

The court of appeals also reversed the decision of the district court because the district court overlooked McCurry's allegation that he had been assaulted unlawfully on arrest by the police

The lower court opinions in *Allen*, typical of most district and circuit court opinions facing these issues, did not address either section 1738 or state law.[35] Although the briefs to the Supreme Court in *Allen* did refer to section 1738, neither party relied on the section and neither considered it dispositive.[36] Thus, the case was not presented to the Court as one of statutory interpretation involving section 1738, but as a conflict between federal principles of issue preclusion and the access to federal court encouraged by section 1983.

Before the Supreme Court, plaintiff argued that the state suppression ruling should not be given effect because the legislative purpose of section 1983 would be defeated if he were forced to accept, as an involuntary litigant, the adjudication of his federal claim by a state court. Drawing on supportive language in the legislative debates and Supreme Court decisions interpreting section 1983, McCurry asserted that distrust of state court fact-finding was the basis for the creation of sections 1983 and 1343. Therefore, he argued that in section 1983 actions, prior state court adjudications should not be accorded their usual deference.[37]

Justice Stewart, writing for a majority of six justices, identified two countervailing arguments favoring preclusion. First, when a federal court considers prior state proceedings, issue preclusion serves not only its normal purposes of finality and judicial economy, "but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system."[38] Second, section 1738 mandates that federal courts give judgments of state courts the same full faith and credit as the judgments would be given in the issuing court.[39] Thus, the central question in *Allen*, as framed by Justice Stewart, was whether the legislative history of section 1983 indicated an intent on the part of Congress to override section 1738 and the corresponding principles of comity.[40]

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officer. This assertion was not barred on preclusion grounds because the issue had not been raised or determined by the state court. *Id.* at 797. The court directed the district court, on remand, "to temporarily abstain until the Missouri courts [in McCurry's pending criminal appeal] have had the opportunity to directly review appellant's conviction and the underlying search of his home." *Id.* at 799.

35. McCurry v. Allen, 606 F.2d 795 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980); McCurry v. Allen, 466 F. Supp. 514 (E.D. Mo. 1978), *rev'd*, 606 F.2d 795 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980).

36. Petitioners urged application of the federal rules of preclusion, not state doctrine under § 1738. "Petitioners rely on § 1738 merely in adducing an additional reason for applying a federal rule of collateral estoppel to this case, although § 1738 could undoubtedly serve as an independent basis for reversing the Court of Appeals." Brief for Petitioners at 25 n.5, *Allen*. Respondent argued that § 1738 was avoided because of the countervailing and compelling federal policies behind §§ 1983 and 1343. Brief for Respondent at 35.

37. Brief for Respondent at 9-16, *Allen*.

38. *Allen*, 449 U.S. at 96.

39. *Id.*

40. *Id.* at 97-98. The concept of comity is applicable whenever a court is asked to address matters that already have been considered or may be considered by courts of another sovereign. Comity suggests respect for, and deference to, judgments of another court system in international law contexts. In the American federal system, comity has special significance as a principle of self-restraint on the part of federal courts in relation to state courts. This federalism principle of comity is " '[t]he scrupulous regard for the rightful independence of state governments which

The majority noted that the judicial doctrines of claim and issue preclusion were well established in 1871. In enacting section 1983, Congress presumably was aware that those doctrines, in conjunction with section 1738, would not allow relitigation of section 1983 claims in federal court. The Court addressed the issue as one of implied repeal—whether section 1983 was in irreconcilable conflict with section 1738[41]—because the Civil Rights Act of 1871 did not repeal expressly either section 1738 or those common-law doctrines.

Justice Stewart found "only the most equivocal support"[42] for the proposition that section 1983 is in irreconcilable conflict with section 1738 and common-law preclusion principles. He noted that Congress, when it enacted section 1983, created a new federal cause of action and a new category of federal jurisdiction, but did not intrude on the concurrent jurisdiction of state courts over federal issues. Justice Stewart concluded that in the absence of an explicit repeal of either section 1738 or the common-law doctrines of preclusion, the fairest reading of the legislative history was that Congress did not intend to restrict state court jurisdiction or the effect of state court judgments when "state courts have recognized the constitutional claims asserted and provided fair procedures for determining them."[43]

Justice Blackmun, joined by Justices Brennan and Marshall, dissented. He did not address the application of section 1738, however, or the majority's implied-repeal analysis. Instead, the dissent stated that the issue was "whether a *common law doctrine* is to apply to [section] 1983 when the statute itself is silent."[44] Justice Blackmun acknowledged that preclusion principles should be applied in section 1983 cases, but argued that they should be applied with a flexibility reflecting "the policies underlying section 1983."[45] The dissent rejected the majority's per se ruling that section 1983 actions are subject to issue preclusion because of concern for potential conflict between preclusion princi-

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should at all times actuate the federal courts.' " Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 108 (1981) (quoting Matthews v. Rodgers, 284 U.S. 521, 525 (1932)).

41. *Allen*, 449 U.S. at 99. The majority cited Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976), for the proposition that "repeals by implication are disfavored." *Allen*, 449 U.S. at 99. The Court presented two well-settled bases for finding that a subsequent statute repeals an earlier one by implication: when "provisions in the two acts are in irreconcilable conflict," and when the "later act covers the entire subject of the earlier one and is clearly intended as a substitute." *Radzanower*, 426 U.S. at 154. Only the first ground (irreconcilable conflict) was arguable in *Allen*.

42. *Allen*, 449 U.S. at 99.

43. *Id.* Justice Stewart rejected any presumption that state courts will not consider federal constitutional claims competently and sympathetically. Despite § 1983's legislative purposes and context, he saw no basis for "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues." Justice Stewart reaffirmed previous expressions of "the constitutional obligation of state courts to uphold federal law" and of the Supreme Court's "confidence in their ability to do so." *Id.* at 105.

44. *Id.* at 106 (Blackmun, J., dissenting) (emphasis added). Justice Blackmun, analogizing to cases that had considered the incorporation of common-law immunities in § 1983, suggested that § 1983 incorporated the preclusion doctrines as they were established in 1871. He, however, reasoned that the doctrines should apply only as long as their rationale was " 'compatible with the purposes of the Civil Rights Act.' " *Id.* at 106 (Blackmun, J., dissenting) (quoting Owen v. City of Independence, 445 U.S. 662, 638 (1980)).

45. *Id.* at 113 (Blackmun, J., dissenting).

ples and the policy favoring access to a federal forum in specific cases. Instead, the dissent favored a case-by-case accommodation of preclusion and section 1983's choice-of-forum purpose. Justice Blackmun would consider "all relevant factors in each case before concluding that preclusion was warranted."[46]

The dissent criticized the majority's interpretation of section 1983 and its legislative history, and the majority's narrow focus on procedural fairness as the touchstone for the application of preclusion. The dissent asserted that the Congress which enacted section 1983 was not concerned solely that procedures were unfair in state courts, but also "believed that substantive justice was unobtainable" in them.[47]

Several key aspects of the *Allen* decision were left ambiguous. First, the opinion did not clearly rest its holding on section 1738 and state rules of preclusion. The majority chose to address only the "broad question of the applicability of collateral estoppel to section 1983 suits"; "questions as to the scope of collateral estoppel with respect to the particular issues in th[e] case [were] not . . . before [the court]."[48] Although the opinion referred to section 1738 and its mandate that state law govern, that reference was given as "background" for the examination of "the relationship of [section] 1983 and collateral estoppel."[49] Justice Stewart did not state, as a holding, that section 1738 and state law govern—at key points in the opinion he hedged by referring instead to the "normal rules of collateral estoppel,"[50] the "conventional doctrine of collateral estoppel,"[51] the "common-law rules of collateral estoppel,"[52] and the "traditional doctrine of preclusion."[53] The role of section 1738 in suits under section 1983 therefore was left uncertain.

A second ambiguity in *Allen* was the degree of flexibility that the courts

46. *Id.* (Blackmun, J., dissenting). Justice Blackmun cited three factors in *Allen* that weighed against application of issue preclusion: (1) the doctrine, as it was understood in 1871 when § 1983 was enacted, would not have precluded McCurry from relitigating the fourth amendment issue (because collateral estoppel did not extend to civil cases); (2) the particular state proceeding (a suppression hearing) and the review of the constitutional issue in the proceeding were different from the procedure and consideration that a federal court would give a § 1983 claim; and (3) the criminal defendant did not choose voluntarily to litigate his fourth amendment claim in state court—he was an involuntary litigant in state court subject to irresistible pressure to raise all possible defenses to avoid conviction. *Id.* at 114-16 (Blackmun, J., dissenting).

47. *Id.* at 108 (Blackmun, J., dissenting). The dissent noted:

> The legislators perceived that justice was not being done in the States then dominated by the Klan, and it seems senseless to suppose that they would have intended the federal courts to give full preclusive effect to prior state adjudications. That supposition would contradict their obvious aim to right the wrongs perpetuated in those same courts.

Id. at 108-09 (Blackmun, J., dissenting).

48. *Id.* at 93 n.2.

49. *Id.* at 96.

50. *E.g., id.* at 95 n.7; *id.* at 97 n.10.

51. *Id.* at 95 n.7.

52. *Id.* at 99.

53. *Id.* at 98. In the concluding statement of the holding, the opinion ambiguously referred to the "doctrine of collateral estoppel" as applicable to § 1983 and reiterated in a footnote that the Court did not pass on how the "body of collateral estoppel doctrine or 28 U.S.C. § 1738 should apply in this case." *Id.* at 105 n.25.

are to use in applying issue preclusion. The Court appeared to conclude that state rulings must be accorded preclusive effect as long as the party had a "full and fair opportunity to litigate" the issue.[54] Nevertheless, in response to the dissent's criticism that this rule effectively fashioned a new doctrine of preclusion for section 1983 cases "more strict and more confining than the federal rules of preclusion applied in other cases,"[55] the majority stated that it was not establishing any new doctrine of preclusion.[56] Exceptions to preclusion, in addition to the "full and fair opportunity" test, might be appropriate in section 1983 actions.

Finally, the majority and dissenters disagreed over the applicability of the *Allen* decision to claim preclusion. The dissenters concluded that the majority's articulation of its rule—whether the litigant had a full and fair *opportunity* to litigate—would bar litigation of issues that might have been raised, as well as issues that actually were litigated and determined.[57] The majority disputed this assertion, however, and expressly limited its ruling to issue preclusion, reserving the question of claim preclusion in section 1983 cases.[58]

In summary, the *Allen* decision established that section 1983 suits generally are subject to the doctrine of issue preclusion, but it did not identify clearly whether state rules applied under section 1738 or federal common-law principles would govern. It recognized an exception to preclusion when the party did not have a full and fair opportunity to litigate an issue in state court, and left open the possibility of other exceptions to preclusion in section 1983 actions.

B. Kremer v. Chemical Construction Corp.

The decisions in *Haring* and *Migra* clarified some of the ambiguities in *Allen* about section 1983 actions. First, however, the Court applied section 1738 to a Title VII employment discrimination action in *Kremer v. Chemical Construction Corp.*[59] *Kremer* adopted a relatively narrow and inflexible reading of section 1738 that appears to conflict with the implications of *Allen* and *Haring*. In light of *Haring* and other section 1738 precedent,[60] some of

54. *Id.* at 101.

55. *Id.* at 112-13 (Blackmun, J., dissenting).

56. The Court noted:

> Contrary to the suggestion of the dissent, . . . our decision today does not "fashion" any new, more stringent doctrine of collateral-estoppel, nor does it hold that the collateral estoppel effect of a state-court decision turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate a federal question. Our decision does not "fashion" any doctrine of collateral estoppel at all. Rather, it construes § 1983 to determine whether the conventional doctrine of collateral estoppel applies to the case at hand. It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral-estoppel defense in this case is not before us.

Id. at 95 n.7.

57. *Id.* at 113 n.12 (Blackmun, J., dissenting).

58. *Id.* at 97 n.10.

59. 456 U.S. 461 (1982).

60. *See infra* text accompanying notes 124-242.

Kremer's conclusions regarding section 1738 in a Title VII setting are not transferable to a section 1983 context. The relatively inhospitable attitude expressed in *Kremer* towards extending the availability of a federal forum beyond the express provisions of Title VII are more a reflection of the Court's attitude toward the Title VII remedial scheme than they are a construction of section 1738 that is fully applicable in section 1983 contexts.

Plaintiff in *Kremer* was barred from litigating a claim under Title VII of the 1964 Civil Rights Act[61] on the basis of prior proceedings under a comparable New York employment discrimination statute. A state agency had concluded that the complaint did not show probable cause of discrimination based on age or national origin.[62] Kremer unsuccessfully sought review of the administrative decision in state court, which upheld the agency action under a limited judicial review standard.[63] Subsequently, plaintiff brought suit in federal court under Title VII on the same alleged discrimination; the district court dismissed the action on preclusion grounds.[64] The United States Court of Appeals for the Second Circuit affirmed.[65]

Justice White, writing for a five-justice majority, first analyzed section 1738's directive that the federal courts give the same effect to a state court judgment as would the courts of the judgment state. Kremer was precluded by state statute from bringing any other suit based on the same grievance in New York courts.[66] Justice White concluded that "[b]y its terms, therefore, [section] 1738 would appear to preclude Kremer from relitigating the same question in federal court."[67]

The majority opinion considered and rejected two possible escape routes from section 1738's bar to the action: that Title VII's provisions for federal court de novo consideration of discrimination claims were an implied repeal of section 1738's full-faith-and-credit principle because Title VII and section 1738 were irreconcilable, and that the New York judgment should not be given preclusive effect because the procedures provided were constitutionally inadequate.

To determine whether section 1738 was in irreconcilable conflict with Title VII, the opinion reviewed the legislative history of Title VII and the complex procedural relationship between state and federal agencies in effectuating

61. 42 U.S.C. §§ 2000e to 2000e-5(c) (1982).

62. *Kremer*, 456 U.S. at 464. Plaintiff initially filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). The EEOC, pursuant to a Title VII requirement, 42 U.S.C. § 2000e-5(c) (1982), referred Kremer's charge to the state agency responsible for the enforcement of the New York statute that prohibits employment discrimination. *Id.* at 463-64.

63. *Id.* at 464. Under the governing New York statute, the reviewing court may reverse the agency determination that no probable cause exists only if that determination is "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." N.Y. EXEC. LAW § 297-a(7)(e) (McKinney 1982), *quoted in Kremer*, 456 U.S. at 491.

64. *Allen*, 477 F. Supp. 587 (S.D.N.Y. 1979), *aff'd*, 623 F.2d 786 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982).

65. *Allen*, 623 F.2d 786 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982).

66. N.Y. EXEC. LAW § 300 (McKinney 1982), *quoted in Kremer*, 456 U.S. at 467.

67. *Kremer*, 456 U.S. at 467.

Title VII's enforcement.[68] Applying a "cardinal principle of statutory construction," Justice White concluded that section 1738 and Title VII could and should be read consistently. When claimants seek state judicial review they will be bound by the state outcome in a subsequent federal action to the same extent that they would have been if the subsequent action had been brought in state court.[69]

Plaintiff's other argument, based on *Allen*, was that the New York proceeding was so "fundamentally flawed" that it should have been "denied recognition under [section] 1738."[70] Justice White recognized the *Allen* limitation on preclusion—that the party must have had a full and fair opportunity to litigate the claim or issue—but acknowledged that previous decisions had not "specified the source or defined the content" of the full-and-fair-opportunity standard.[71] Justice White then identified, at least for section 1738 cases, the due process clause of the fourteenth amendment as the source of this limitation on full faith and credit.[72]

Using the due process clause as the constitutional basis for the full-and-fair-opportunity test justifies its status as an exception to section 1738, but at the same time limits dramatically the test's scope and significance. As a constitutional prerequisite, it supercedes a state's preclusion rules.[73] A state may not give effect in its own courts to a constitutionally infirm judgment; thus, a federal court that refuses to preclude a claim or issue that was not fully and fairly heard in state court would be giving the state court judgment the "same full faith and credit" as would the rendering state's courts.[74]

This rationale for the full-and-fair-opportunity exception to section 1738 also restricts its scope. The Supreme Court previously had defined this exception to preclusion more broadly: "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."[75] This earlier articulation of the standard connoted a more flexible and searching review of the nature of the state proceed-

68. *Id.* at 468-78.

69. The majority and dissent both agreed that Title VII provides de novo consideration by a federal court of a discrimination claim after deliberations by either a state or federal administrative agency. Thus, plaintiff had an unimpeded right to bring a federal civil action after the adverse action by the New York agency. Title VII, however, neither requires claimants to pursue state judicial review of an unfavorable administrative determination nor specifies the weight to be given a state judgment if such a remedy is sought. The majority concluded that plaintiff's decision to seek state court review was not governed by provisions in Title VII and, therefore, was subject to the consequences of preclusion under § 1738. *Id.* at 469-70.

70. *Id.* at 480.

71. *Id.* at 481.

72. *Id.*

73. U.S. CONST. art. VI, § 2 states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

74. *Kremer*, 456 U.S. at 482.

75. Montana v. United States, 440 U.S. 147, 164 n.11 (1979).

ing. Justice White, however, indicated in *Kremer* that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full-faith-and-credit guaranteed by federal law."[76] The *Kremer* Court concluded that, under this minimal requirement test, "Kremer received all the process that was constitutionally required" in the New York administrative proceedings.[77]

The dissenting opinions of Justices Blackmun and Stevens criticized the application of section 1738 to the New York judicial review proceeding because of the limited scope of the state court's determination.[78] The dissenters also disagreed with Justice White's narrow application of the full-and-fair-opportunity exception to section 1738.[79]

The heart of the dispute between the majority and the dissent in *Kremer* was whether federal principles of preclusion may be employed in issue preclusion analysis. The majority opinion presented a simplistic reading of section 1738 in which federal doctrine is irrelevant—section 1738 directs that state preclusion law governs and the only exceptions to it must be intended by Congress (express or implied repeal of section 1738)[80] or must be of a consititutional dimension (due process or full and fair opportunity to litigate).[81] In contrast, the dissenters would have permitted federal consideration of Kremer's claim because of federal principles that limit the application of issue preclusion.[82]

The dissenters could have challenged, but did not, however, Justice White's statement that "[i]t has long been established that [section] 1738 does not allow federal courts to employ their own rules of res judicata in determin-

76. *Kremer*, 456 U.S. at 481.

77. *Id.* at 483.

78. The dissenters concluded that because the New York statute provided such a limited basis for reversal of agency action, *see supra* note 63, the issue before the New York court—whether "a rational adjudicator might have resolved the discrimination issue either way," *Kremer*, 456 U.S. at 509 (Stevens, J., dissenting)—was not the same issue that would have been before a federal court in a de novo action under Title VII. They concluded that no preclusion could result from the New York proceeding under federal issue preclusion standards because of this difference between the issue decided by the New York court and the issue before the federal district court. *Id.* at 493 (Blackmun, J., dissenting); *id.* at 509-10 (Stevens, J., dissenting).

79. The dissenters would apply the broader federal limitation on preclusion set forth in Montana v. United States, 440 U.S. 147, 164 n.11 (1979); thus, relitigation may be justified if there is reason to doubt the "quality, extensiveness or fairness of procedures." *Id.* The nature of the New York judicial proceeding, with its limited review of agency action, led the dissenters to the conclusion that it need not be given the same preclusive effect as a de novo proceeding in a state court. *Kremer*, 456 U.S. at 494 (Blackmun, J., dissenting); *id.* at 511 (Stevens, J., dissenting).

80. "Allen v. McCurry made clear that an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 468 (citation omitted). "Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress." *Id.* at 485.

81. *Id.* at 481-85.

82. The dissenters argued that the federal court should provide de novo consideration despite New York's statutory bar because of the difference in the issues before the two courts. They relied upon federal court precedents that established "a basic principle of preclusion doctrine . . . that a decision in one judicial proceeding cannot bar a subsequent suit raising issues that were not relevant to the first decision." *Id.* at 493 (Blackmun, J., dissenting).

ing the effect of state judgments."[83] Thus, neither the majority nor the dissenters considered previous Supreme Court decisions that had recognized exceptions to section 1738 and had subordinated state preclusion rules to conflicting state and federal interests. Justice White, however, did refer to several decisions that had construed section 1738 to support his linking of the full-and-fair-opportunity exception to the due process clause.[84] Several of the decisions cited contradict the strict, state-law-governs reading of section 1738 that he presented.[85]

Kremer appeared to establish a rigid rule that state law governs in state-federal litigation under Title VII. It also appeared to hold that both state claim and issue preclusion doctrines are applicable in such actions by virtue of section 1738.[86] Subsequently, however, lower federal courts were divided over *Kremer*'s application to section 1983 actions. Several courts of appeals treated the *Kremer* reading of section 1738 as controlling in section 1983 litigation; in other circuits, however, *Kremer* was not considered dispositive of the issues left open in *Allen*.[87]

C. *Haring v. Prosise*

The Supreme Court's decision in *Haring v. Prosise*[88] appears to have set-

83. *Id.* at 481-82.

84. *See id.* at 482-83 & nn.23-24.

85. Justice White referred to M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839), which permitted relitigation when common-law jurisdictional requirements were not satisfied in the prior proceeding, *id.* at 329; Haddock v. Haddock, 201 U.S. 562 (1906), which allowed a state to deny full faith and credit to a sister state's divorce decree, *id.* at 573-75; and Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943), which applied preclusion in successive workers' compensation cases but acknowledged the existence of nonconstitutional public policy exceptions to the strict mandate of § 1738, *id.* at 438. These and other decisions construing § 1738 are discussed *infra* notes 124-242 and accompanying text.

86. The majority opinion did not specifically apply claim preclusion, indicating that either claim or issue preclusion might be applicable. *Kremer*, 456 U.S. at 481 n.22. The Court's statement of its holding, however, explicitly did conclude that application of res judicata as well as collateral estoppel would be compatible with Title VII in cases like *Kremer*. *Id.* at 485.

87. Decisions by various courts of appeals after *Kremer* and prior to *Haring* demonstrated that uncertainty existed after *Allen* on at least two points: whether claim preclusion applied to § 1983 actions, and whether § 1738, with its state-law directive, was the source of preclusion doctrine in state-federal litigation of § 1983 claims. *See* Isaac v. Schwartz, 706 F.2d 15, 16-17 (1st Cir. 1983) (claim preclusion applies to § 1983 actions; the court examined state law as § 1738 requires, and also considered general rules of preclusion as outlined in the RESTATEMENT (SECOND) OF JUDGMENTS); Gargiul v. Tompkins, 704 F.2d 661, 665 (2d Cir. 1983) (court expressed distaste for a "traditional Draconian formulation of rules of res judicata" (quoting Winters v. Lavine, 574 F.2d 46, 56 (2d Cir. 1978)), despite *Allen*'s "suggestion that the principles of res judicata may be applicable to § 1983 actions"); Nilsen v. City of Moss Point, 701 F.2d 556, 563-64 (5th Cir. 1983) (claim preclusion held to apply to § 1983 actions; state law of preclusion must apply under § 1738); Lee v. City of Peoria, 685 F.2d 196, 198-99 (7th Cir. 1982) (claim preclusion applied in § 1983 action); Castorr v. Brundage, 674 F.2d 531 (6th Cir. 1982) (claim preclusion not always mandatory; certain § 1983 claims may not be barred by res judicata, § 1738 not mentioned by court); Prosise v. Haring, 667 F.2d 1133 (4th Cir. 1981) (collateral estoppel and res judicata may operate to deprive § 1983 plaintiff of choice of forum, but court emphasized importance of choice of forum, concluding that application of preclusion turns on more than a full and fair opportunity to litigate; court referred explicitly to *Allen* and its command that § 1738 operates in the context of § 1983, but noted that *Allen* reserved the question of how § 1738 operates, *id.* at 1137-38 (citing *Allen*, 449 U.S. at 105 n.25)), *aff'd*, 103 S. Ct. 2368 (1983).

88. 103 S. Ct. 2368 (1983).

tled several of the ambiguities in *Allen* and *Kremer* in its application of issue preclusion analysis to a section 1983 action raising fourth amendment claims. *Haring* confirmed that section 1738 and state preclusion rules are the starting point for analysis in section 1983 actions as well as in Title VII suits. At the same time, Justice Marshall's opinion for a unanimous Court indicated that section 1738 will not be construed as strictly in a section 1983 context.

In *Haring*, plaintiff Prosise sought damages against police officers who allegedly had violated his fourth amendment rights when they searched his apartment. Prosise was charged in state court with possession and manufacture of a controlled substance after the search led to discovery of drugs and related materials. In a plea agreement Prosise admitted guilt to the crime of manufacturing the drug and the prosecution dropped the possession charge. At a hearing concerning the guilty plea, one of the officers testified to the search and seizure of the incriminating evidence in Prosise's apartment. The state judge accepted Prosise's guilty plea, finding that it had been entered voluntarily and intelligently and that it had a sufficient basis in fact.[89]

The question before the Supreme Court was whether Prosise's guilty plea in state court precluded his section 1983 claim based on the alleged police violation of his fourth amendment rights. A unanimous Court concluded that the state proceedings had no such preclusive consequences. The opinion's first point of analysis was the same as in *Kremer*—that by virtue of section 1738 federal courts generally should give preclusive effect to state court judgments whenever the issuing court would do so: "The threshold question is whether, under the rules of collateral estoppel applied by the Virginia courts, the judgment of conviction based upon Prosise's guilty plea would foreclose him in a later civil action from challenging the legality of a search which had produced inculpatory evidence."[90] Justice Marshall recognized that in situations in which state law was uncertain the federal courts could look for guidance to preclusion doctrine "as it is generally applied in other jurisdictions." Justice Marshall found it unnecessary to do so in *Haring* because Virginia law would not preclude Prosise's action.[91] Because the issue of the legality of the search had not been litigated or determined in the state proceeding and because the issues regarding Prosise's guilt, which had been determined, were not relevant to his right to compensation under section 1983, issue preclusion was inapplicable under Virginia doctrine. Claim preclusion was not at issue in *Haring* because the federal plaintiff could not have raised a claim for compensation against the police officers as part of the state criminal prosecution.[92]

Defendant police officers argued that even if Virginia law would not preclude the section 1983 claim, a more restrictive rule of preclusion should be applied to deter federal court litigation of fourth amendment claims by state prisoners. They contended that a more preclusive rule would be consistent

89. *Id.* at 2370.
90. *Id.* at 2373.
91. *Id.* at 2374.
92. *Id.*

with Supreme Court habeas corpus decisions that deny federal court consideration of fourth amendment issues in the review of a state court conviction based on a guilty plea. In defendants' view, the state criminal proceeding provided a full and fair opportunity for Prosise to litigate the fourth amendment issue; therefore, his failure to do so should be treated as a waiver of his claim.[93]

The Court rejected these arguments advocating a more preclusive federal rule by distinguishing the purposes and elements of habeas corpus, in which a waiver rule has been applied, from section 1983 compensation claims.[94] Justice Marshall concluded that a more preclusive rule "would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights."[95] Thus, defendants' proposal was an objectionable effort to compel litigation of constitutional claims in state, rather than federal, court. The rule suggested by defendants "would be wholly contrary to one of the central concerns which motivated the enactment of [section] 1983, namely, the 'grave Congressional concern that the state courts had been deficient in protecting federal rights.' "[96]

The *Haring* opinion clarified both *Allen* and *Kremer*.[97] Justice Marshall's opinion in *Haring*, consistent with *Kremer*, confirmed that section 1738 and state issue preclusion doctrines govern section 1983 cases. The opinion, however, looks to state law as the *starting point* and not as the sole determinant of the claim and issue preclusion effects of a state court judgment in section 1738 analysis. The Court held that state law "generally" will govern, and that the "threshold" inquiry should be into the Virginia rules of preclusion.[98] This qualifying language implies that state preclusion rules will not be dispositive in all cases.

In contrast to *Kremer*, but consistent with *Allen*, *Haring* recognized the applicability of a federal exception to state rules of preclusion in addition to the full-and-fair-opportunity standard. The Court stated that "additional exceptions to collateral estoppel may be warranted in section 1983 actions in light of the 'understanding of [section] 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights.' "[99]

This exception to a strict preclusion rule based on the "understanding of [section] 1983" and later references in Justice Marshall's opinion to "preserv-

93. *Id.* at 2376.

94. *Id.* at 2376-78.

95. *Id.* at 2378.

96. *Id.* (quoting *Allen*, 449 U.S. at 98-99).

97. *Haring* is a significant case both for the clarifications of *Allen* discussed in this Article and because a unanimous Court permitted litigation in federal court. The Court rejected a comity-based argument that would have restricted plaintiffs to state court adjudication of federal constitutional rights. This decision and Patsy v. Board of Regents, 102 S. Ct. 2557 (1982), run counter to the Burger Court's trend of restricting access to a federal forum. *Haring*'s careful application of state issue preclusion principles signals disagreement with the lower court decisions that applied *Allen* as a sweeping, comity-based doctrine for clearing dockets of prisoner suits.

98. *Haring*, 103 S. Ct. at 2373.

99. *Id.* (quoting *Allen*, 449 U.S. at 101).

ing federal courts as an available forum for the vindication of constitutional rights"[100] resurrect the legislative purpose of section 1983 as a factor in issue preclusion analysis. Although *Allen* rejected the access-to-federal-court purpose of section 1983 as justification for a per se rule that section 1738 does not apply, *Haring* suggests that the understanding of section 1983 regarding choice of forum in some cases may justify an exception to state rules of preclusion.[101]

Although *Haring* states that federal courts may deviate from state rules of preclusion to apply federal principles that would allow litigation, the Court did not explain the logical or doctrinal basis for this reading of section 1738 and did not develop the nature and scope of such special federal rules. Because Virginia's issue preclusion doctrine would not bar Prosise's suit, the court did not have to consider the content of, or justification for, an understanding-of-section-1983 exception to state law.

D. Migra v. Warren City School District Board of Education

Migra v. Warren City School District Board of Education,[102] the Court's most recent preclusion decision in this sequence, did not address directly the exceptions to preclusion mentioned in *Haring*.[103] *Migra* settled the question reserved in *Allen* regarding the application of claim preclusion in section 1983 actions, however, and confirmed the role of section 1738 and state law in state-federal preclusion analysis.

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100. *Id.* at 2378.

101. The second part of the *Haring* decision, which rejected defendants' waiver argument, also undercuts the notion that § 1738 demands simple fidelity to state law. Justice Marshall rejected defendants' argument that federal interests in comity and judicial economy justified preclusion even if Virginia law would not bar this action. *Id.* at 2375-76. If § 1738 is read literally—a federal court must give state proceedings "the *same* full faith and credit" as a state court—the Court could have rejected defendants' argument for a federal rule with *greater* preclusive effect on that narrow reading. Instead, the parties and the Court assumed that a federal court, consistent with § 1738, *could* apply a more preclusive standard for the federal court system if it were justified on a policy basis. The Court stated, however, that if "state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater efficacy.' " *Id.* at 2373 n.6 (quoting Union & Planters' Bank v. Memphis, 189 U.S. 71, 75 (1903)). *Cf.* Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892 (1984) (White, J., concurring) (stating that the doctrine of Union & Planters' Bank v. Memphis, 189 U.S. 71, 75 (1903) was well settled and had been applied correctly, but was "unfortunate").

102. 104 S. Ct. 892 (1984).

103. Subsequent to *Migra*, the Supreme Court considered the application of preclusion to a § 1983 action in federal court following an arbitration proceeding. McDonald v. City of West Branch, 104 S. Ct. 1799 (1984). That decision did not implicate § 1738 and thus did not address directly the questions considered in this Article. Because arbitration proceedings are not "judicial proceedings" to which § 1738 requires full faith and credit, the Court held that § 1738 did not govern the preclusion analysis. *Id.* at 1801-02. In the absence of a statutory mandate, the Court did not employ the implied repeal analysis of *Allen* and *Kremer*, *see supra* text accompanying notes 41-43, 68-69, but treated the issue as whether federal common-law preclusion doctrines should extend to arbitration awards. *Id.* at 1802.

A unanimous Court concluded that arbitration rulings should not be given claim and issue preclusion consequences because to do so would violate § 1983's legislative purpose—to create judicially enforceable rights. An arbitration proceeding was determined to be an inadequate substitute for federal trial because the expertise and authority of an arbitrator is restricted to the contract and to the "law of the shop": the union, rather than the individual, usually has exclusive control over presentation of the arbitration grievance and arbitral fact-finding and procedures are limited in comparison to judicial fact-finding and procedures. *Id.* at 1803-04.

Plaintiff in *Migra*, a supervisor of elementary education, had her employment terminated by the Warren (Ohio) City School District Board of Education.[104] She initially brought suit in state court, alleging state-law claims of breach of contract by the Board and wrongful interference by individual Board members with her contract of employment.[105] The state judge found for plaintiff on the contract claim after a bench trial and ordered that she be reinstated with back pay. The court reserved and continued the claim regarding the individual members' liability, which was later dismissed without prejudice at plaintiff's request.[106]

Plaintiff subsequently filed an action in federal court under sections 1983 and 1985[107] in which she alleged a conspiracy to violate her first, fifth, and fourteenth amendment rights.[108] Plaintiff claimed that in the course of her employment she had advocated curriculum changes and the implementation of a voluntary desegregation plan. Plaintiff charged that board members had terminated her employment as punishment for her exercise of free speech and advocacy of desegregation, and that they had falsely and maliciously attempted to smear her reputation and deprive her of continued employment without due process. Plaintiff sought injunctive relief and compensatory and punitive damages.[109]

The district court granted the school board summary judgment on claim preclusion grounds, reasoning that plaintiff could have raised her civil rights claims in the state proceeding. The court concluded that section 1983 actions were subject to claim preclusion, as well as to issue preclusion, on the basis of decisions that had been handed down by the United States Court of Appeals for the Sixth Circuit prior to *Allen*.[110] The district court did not refer to section 1738 or to Ohio rules of preclusion, but instead relied on federal common-law precedent for its decision that claim preclusion barred separation of plaintiff's state and federal claims into two suits.[111] The court of appeals affirmed in a brief opinion.[112]

On appeal to the Supreme Court, Migra and the school board conceded that section 1738 and Ohio rules of preclusion should govern.[113] Their disa-

104. Dr. Migra was employed under written, annual contracts for successive school years from 1976 to 1979. She initially was offered renewal of her contract for the 1979-1980 school year; she accepted the appointment by letter. The Board subsequently voted not to renew her employment and she never received a written contract for 1979-1980. *Id.* at 894-95.

105. Plaintiff's state court complaint was in five counts, including allegations that the board's second meeting, at which the offer of renewal was revoked, was without legal effect because it did not comply with the Ohio procedural requirements for special board meetings. *Id.*

106. *Id.*

107. 42 U.S.C. §§ 1983, 1985 (1982).

108. 104 S. Ct. at 895.

109. *Id.*

110. Migra v. Warren City School Dist. Bd. of Educ., No. C80-1183-Y slip op. (N.D. Ohio 1981), *aff'd*, 703 F.2d 564 (6th Cir. 1983), *aff'd*, 104 S. Ct. 892 (1984).

111. *Id.* at 4-5.

112. *Migra*, 703 F.2d 564 (6th Cir. 1983), *aff'd*, 104 S. Ct. 892 (1984).

113. At oral argument "both counsel took the position that Ohio's version of res judicata governs." 199 DAILY LAB. REP. (BNA) A-3 (Oct. 13, 1983).

greement centered on the application of Ohio preclusion principles to Migra's second suit—whether the second suit raised sufficiently distinct claims to be a different "cause of action" from that adjudicated by the state court and whether the severence and reservation of plaintiff's tort claim by the state trial judge prevented the merger of related tort claims with the judgment on the contract claim.[114] Briefs of *amici curiae* urged the Court to take a different approach—to establish a rule of "qualified preclusion" in section 1983 cases that would apply issue preclusion to matters actually litigated and determined by a state court, but that would not preclude federal claims that were withheld in the state proceeding. The *amici* briefs argued that the legislative purpose of section 1983—to provide a federal forum for federal claims—was inconsistent with the application of claim preclusion to matters not actually litigated in a prior state action.[115]

A unanimous Supreme Court affirmed the primacy of section 1738 and state law in the application of claim preclusion to section 1983 actions. Drawing heavily on *Allen*'s construction of sections 1738 and 1983, the Court rejected the *amici curiae*'s argument that the claim preclusion consequences of a state judgment should be analyzed differently from issue preclusion. The Court found it "difficult to see" any policy concerns underlying section 1983 that would justify differing treatment of claim and issue preclusion and concluded that the argument for an implied repeal of section 1738 by section 1983 in this claim preclusion context was indistinguishable from that rejected in *Allen*.[116] Thus, the Court held that the prior judgment should have the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts. The action was remanded to the district court for interpretation and application of Ohio law.[117]

Justice White, joined by Chief Justice Burger and Justice Powell, wrote a concurring opinion that addressed the possibility that a federal court might preclude the litigation on the basis of federal claim preclusion principles even if the Ohio courts would not. Justice White expressed support for a reading of section 1738 that would allow federal courts to apply more strict preclusion principles than state courts because a refusal to devote federal court resources to the litigation still would leave the parties free to litigate in state court. He concluded, however, that previous decisions of the Supreme Court had established a construction of section 1738 that set state preclusion law as a "ceiling"

114. Brief of Petitioner at 14-23; Brief of Respondent at 7-22.

115. Brief for the American Civil Liberties Union and the Greater Cleveland Chapter of the A.C.L.U. at 38-62; Brief for the National Education Association at 2-10. Respondent's Brief answered the *amici*'s arguments for an exception to § 1738 at 22-31, as well as plaintiff's interpretation of Ohio preclusion doctrine, at 7-22. Professor Shapiro has developed justifications for treating claim preclusion differently from issue preclusion in an article written prior to the Supreme Court's decision in *Migra*. Shapiro, *The Application of State Claim Preclusion Rules in a Federal Civil Rights Action*, 10 OHIO N.U.L. REV. 223, 230-35 (1983).

116. *Migra*, 104 S. Ct. at 897-98.

117. The Supreme Court concluded that Ohio preclusion doctrine was evolving; the Court was uncertain how the doctrine would apply to Migra's second suit. *Id.* at 899. Because the lower courts had not applied Ohio case law, it was appropriate for the Court to remand for consideration of this issue. *Id.*

as well as a "floor" for purposes of full faith and credit. Because this interpretation of section 1738 was long standing and had been left undisturbed by Congress, Justice White felt compelled to acquiesce in the Court's reliance on Ohio law, despite his desire to permit more federal control over court dockets.[118]

The *Migra* decision stands as the analogue to *Allen*; it established the applicability of claim preclusion to section 1983 actions. The *Migra* opinion, however, could be read to go even further in its apparent reliance on a literal interpretation of section 1738. The Court's opinion presents *Allen* and *Kremer* as adopting a state-law-governs reading of section 1738; *Migra* contains neither *Haring*'s hedge words nor references to *Haring*'s summary of preclusion analysis, which treated state law as only the starting point and included exceptions based on the full-and-fair-opportunity standard and the understanding of section 1983. The *Haring* opinion is referred to only in the most general way.[119] The Court's choice of language and the apparent absoluteness of the proposition that Ohio law must govern can be read to suggest that the strict *Kremer* reading of section 1738 also should be applied to section 1983 actions.

There are several reasons to doubt that Justice Blackmun's majority opinion in *Migra* intended to foreclose the possibility of case-by-case exceptions to preclusion as suggested in *Haring* and as proposed by this Article. The *Migra* decision must be interpreted in light of both the lower court opinions reviewed by the Court and the parties' arguments presented to the Court. The district court decision, rendered after *Allen* but before *Kremer* and *Haring*, had relied upon the principles of preclusion established in federal case law, rather than section 1738 or Ohio law. Given the benefit of the *Kremer* and *Haring* decisions, the parties on appeal to the Supreme Court accepted that section 1738 and Ohio law would govern. They did not assert that either of *Haring*'s exceptions to the application of state law were relevant. The *amici*, however, urged adoption of a blanket exception to claim preclusion based on the alleged inconsistency between the purpose of section 1983 and the preclusion of claims not reached by a state court.

The Court's opinion, therefore, is a clear rejection of the lower court's application of federal preclusion doctrine and of the *amici*'s efforts to distinguish claim preclusion from issue preclusion in section 1738 analysis. The applicability of section 1738 in claim preclusion analysis, however, does not determine whether there may be case-by-case exceptions to the application of state law under section 1738. *Migra*'s reliance on the reasoning and statutory interpretation in *Allen* is instructive. *Allen*'s rejection of an implied repeal argument and recognition that section 1738 governs in issue preclusion analysis left open the possibility of some exceptions to preclusion.[120] The full-and-fair-

118. *Id.* at 899-900 (White, J., concurring).

119. *Id.* at 896. *Haring* is cited only after quotations from *Allen* and *Kremer* regarding construction of § 1738.

120. *See supra* text accompanying notes 54-56.

opportunity test explicated in *Kremer* and the understanding-of-section-1983 exception presented in *Haring* are consistent with *Allen*'s conclusion that section 1738 governs in section 1983 actions. The *Migra* decision equates the analysis of claim preclusion and issue preclusion under section 1738; presumably, *Migra* would have recognized similar exceptions to the application of state law if that had been necessary to the outcome of the appeal.

The applicability of the exceptions to preclusion was not raised by any of the parties to *Migra* and was not considered by the Court. In addition, *Migra* presented a particularly unsympathetic case to escape the application of state preclusion law. Plaintiff had freely exercised a choice of forum. As Justice Blackmun noted, plaintiff could have brought her state claims along with her federal claims in a federal court action under pendent jurisdiction. Plaintiff thereby would have been assured a federal forum for her federal claim even if the federal court had declined to hear her state-law claim.[121] Justice Blackmun distinguished *Migra* from *Allen*, in which he dissented, on the basis of plaintiff's exercise of this choice of forum. Thus, plaintiff already had rejected the federal forum that section 1983 was designed to provide.[122]

The Supreme Court need not have addressed a choice of forum argument, even if it had been available to plaintiff. *Haring* established section 1738 and state law as the starting point for preclusion analysis. Thus, the Court should consider the full-and-fair-opportunity test and the understanding-of-section-1983 exception only if state law would preclude the action. The Supreme Court had no reason to discuss possible exceptions to preclusion because it had declined to decide the preclusion issue under Ohio law. The Court's failure to discuss the full-and-fair-opportunity test should not be interpreted as an implicit rejection of that well-established and constitutionally mandated exception to state preclusion law. This exception was not mentioned by the Court presumably because it was not raised by the parties and did not have to be addressed to conclude that a remand was required. Similarly, the Court's silence regarding *Haring*'s understanding-of-section-1983 exception should not be construed as an implied rejection of case-by-case exceptions to preclusion.

Finally, the Court's opinion does not require a literal reading of section 1738 because such a reading is contrary to the Court's application of section 1738 in other areas. *Allen*, *Kremer*, *Haring*, and *Migra* did not discuss the construction of section 1738 in divorce, workers' compensation, or bankruptcy cases. In these areas the preclusion principles of the rendering state have yielded to conflicting state and federal interests.[123] *Kremer*'s and *Migra*'s description of section 1738 as a strict mandate to apply the issuing state's law

121. If a federal court abstained under *Pullman*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), plaintiff could withhold her federal claim from the state proceeding in an *England* reservation, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), and litigate the federal claim in federal court at the conclusion of the state action. *See Migra*, 104 S. Ct. at 898 n.7.

122. *Id.*

123. *See infra* text accompanying notes 156-243.

is contrary to a substantial body of precedent. Therefore, the Court's opinion should not be interpreted as an implied rejection of similar flexibility in the application of section 1738 to civil rights cases in which the party precluded has not had a chance to exercise the choice of forum that sections 1983 and 1343 were intended to guarantee.

II. FULL FAITH AND CREDIT AND 28 U.S.C. § 1738

The full faith and credit clause of the Constitution[124] and its implementing statute, section 1738,[125] commonly are applied to require the application of the preclusion rules of the state that rendered the prior judgment. It is striking, however, in light of the specific language of the statute and the frequency with which courts cite a state-law-governs reading of it, how infrequently section 1738 is mentioned in cases in which it would be applicable, particularly state-federal litigation, and how often federal principles rather than state law actually are determinative of preclusion.

The courts may not have referred to section 1738 and state preclusion rules in state-federal litigation because historically federal and state preclusion principles have not differed significantly. Reliance on federal case law in many of these instances, therefore, may not signal disagreement with a state-law-governs reading of section 1738 or with state doctrine. Rather, the federal court may have relied on federal precedent with which it was more familiar or that was more developed on the particular subject, on the assumption that state case law would be comparable.[126] The Supreme Court, however, has acted contrary to state preclusion rules in many instances, sometimes without referring to preclusion doctrine,[127] often without referring to section 1738,[128] and occasionally by recognizing an exception to section 1738[129] to accommo-

124. U.S. CONST. art. IV, § 1 (for text see *supra* note 7).

125. 28 U.S.C. § 1738 (1982) (for text see *supra* note 8).

126. Montana v. United States, 440 U.S. 147 (1979), is an example of a decision in state-federal litigation that "innocently" relied on federal preclusion doctrine rather than state law. The preclusion question was one of privity between the public contractor, who was the plaintiff in the state action, and the United States, plaintiff in the federal suit. The Supreme Court concluded that privity existed and barred the second suit based on federal precedent because the United States financed and directed the state litigation. *Id.* at 153-55. The opinion did not mention § 1738 or Montana law, but the conclusion about privity appears to be consistent with Montana preclusion doctrine. It is not appropriate to read the Court's reliance on federal case law as a rejection of either § 1738 or state law because there was no split of authority between the federal courts and Montana over the privity issue.

127. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (plaintiffs permitted to relitigate constitutional claim in federal court because of reasonable belief that federal law required them to raise constitutional issues at state level).

128. *See, e.g.*, Brown v. Felsen, 442 U.S. 127 (1979) (bankruptcy court not confined by prior state court judgment when reviewing dischargeability of debt); England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964) (plaintiffs did not intend to litigate unreservedly constitutional claim in state court and could relitigate claim in federal court); Kalb v. Feuerstein, 308 U.S. 433 (1940) (Bankruptcy Act deprived state court of jurisdiction to decide on mortgage foreclosure prior to decision by bankruptcy court).

129. *See, e.g.*, Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) (successive workers' compensation awards as an exception to full faith and credit); Williams v. North Carolina, 325 U.S. 226 (1945) (second state may treat *ex parte* divorce as nullity if plaintiff did not establish good faith domicile in state of prior action); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174

date other national interests or well-established doctrines that conflicted with full faith and credit.

The concept of full faith and credit that emerges from this review of Supreme Court decisions is not unitary. It reflects different accommodations made by the Court between full faith and credit and other state and federal interests. The Court has not developed a consistent doctrine of exceptions, but has operated largely on an ad hoc basis because of the lack of textual support for exceptions to section 1738 and disagreement over the exceptions' scope and justification.

These exceptions, however, refute the inflexible reading of section 1738 presented in *Kremer* and *Migra*. Prior to *Kremer* it was recognized that full faith and credit "is not an inexorable and unqualified command."[130] The justification for exceptional treatment of section 1983 cases under section 1738 can and should be made on a policy level; substantial precedential support exists for deviation from the literal language of section 1738 for reasons that are comparable to the stated purposes of section 1983.

A. Enactment and Earliest Interpretation[131]

The first Supreme Court decisions construing section 1738 frequently are cited for the proposition that a federal court may not employ its own rules of preclusion to determine the effect of state judgments.[132] *Mills v. Duryee*[133] and *Hampton v. McConnel*[134] applied state law to bar a second action in federal court; neither case, however, involved a conflict between state and federal interests that might have led the Court to question a literal application of section 1738. *Mills* and *Hampton* did not decide between the application of state or federal preclusion law; in the early nineteenth century there was no sense that the common-law preclusion doctrines might develop independently in state and federal courts.

The question addressed in *Mills* and *Hampton* was whether an earlier state judgment had to be given conclusive effect in federal court or should be

(1850) (lack of jurisdiction over defendant in prior proceeding permits second court to reconsider issues).

130. Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 210 (1941).

131. For the history of full faith and credit, see generally Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Nadelman, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33 (1957); Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153 (1949); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 1), 14 CREIGHTON L. REV. 499 (1981).

132. In *Kremer* Justice White referred to Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485 (1813), to support his strict interpretation of § 1738:

> It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

Kremer, 456 U.S. at 481-82.

133. 11 U.S. (7 Cranch) 481 (1813).

134. 16 U.S. (3 Wheat.) 234 (1818).

treated merely as prima facie evidence of the winning party's claim. It was unclear how much credit a second court had to give to a judgment of another court because the language and legislative history of the constitutional clause and section 1738 were ambiguous.

"Faith" and "credit" were evidentiary terms used at common law to describe the effect given to judgments from a foreign jurisdiction. The recognition of such judgments was a matter of comity, a respect for courts of another sovereign.[135] Sister colony judgments in the American colonies prior to the Articles of Confederation were treated as foreign judgments under international law principles—they generally were admissible as prima facie evidence of a claim or defense, but were not accorded the conclusive effect that was given a judgment within the same colony.[136]

The Articles of Confederation contained a full faith and credit clause similar to the one that later was ratified in the Constitution.[137] There are no records of debates or committee reports that explain the purpose of the clause. Court decisions interpreting the Articles of Confederation were divided over whether the requirement of "full" faith and credit meant to alter the common-law treatment of sister colony judgments.[138]

Efforts to specify that conclusive effect must be given a sister state judgment were defeated at the Constitutional Convention.[139] A compromise was reached whereby the ambiguous full faith and credit language of the Articles of Confederation was retained and authority was delegated to Congress to prescribe how prior judgments were to be proven and what effect they should have:[140] "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."[141]

In 1790 the first Congress exercised this authority and enacted the predecessor to section 1738.[142] The statute went further than the constitutional clause; it applied to "every court within the United States," and therefore covered federal as well as state courts. It also provided for authentication of judgments through the attestation of records of judicial proceedings. It still used the ambiguous evidentiary terms "faith" and "credit," however, to describe

135. Nadelman, *supra* note 131, at 48-53; Whitten, *supra* note 131, at 555-559.

136. Nadelman, *supra* note 131, at 48-53; Whitten, *supra* note 131, at 555-559.

137. Article IV of the Articles of Confederation provides: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other State."

138. Nadelman, *supra* note 131, at 49-53; Whitten, *supra* note 131, at 535-542.

139. Jackson, *supra* note 131, at 3-7; Nadelman, *supra* note 131, at 55-59.

140. Whitten, *supra* note 131, at 550-52.

141. U.S. CONST. art. IV, § 1.

142. Act of May 26, 1790, ch. 11, 1 Stat. 122. For all purposes relevant to this Article, the statute remains unchanged. A 1948 amendment that was not intended to alter the statute's meaning amended the phrase "such faith and credit" to the present "same full faith and credit." Act of June 25, 1948, § 1738, 62 Stat. 942. *See* Nadelman, *supra* note 131, at 81-82.

the effect to be given such authenticated records.[143]

Lower federal courts prior to the 1813 *Mills* decision disagreed whether conclusive or prima facie effect was appropriate under the statute.[144] In *Mills*, defendant in a federal court debt collection action attempted to relitigate the issue of his liability, which had been determined by a New York state court. Justice Story resolved the debate between conclusive and prima facie effect, ruling that New York law should govern by virtue of the predecessor to section 1738.[145] Because a New York court would not reconsider defendant's liability on the debt, the federal court should preclude relitigation of this issue as well.[146]

The *Mills* reading of the predecessor to section 1738 was reaffirmed by Chief Justice Marshall in *Hampton*: "The judgment of a state court should have the same credit, validity, and effect in every other court of the United States which it had in the state where it was pronounced."[147] The general rule of *Mills* and *Hampton* has become well established; a judgment will have the same preclusion consequences in a second forum that it would have in the rendering state.[148]

The Supreme Court has not had the benefit of a legislative history to construe section 1738 because records of debate and committee consideration of the predecessor to section 1738 apparently were destroyed during the War of 1812.[149] The literal reading of the statute adopted in *Mills* and *Hampton* is consistent with what the Court has described as the unifying purpose of the constitutional clause it was implementing—"to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."[150]

No conflict existed in either *Mills* or *Hampton* between literal application of state law pursuant to section 1738 and any interest of the federal court system. Exceptions to a strict reading of section 1738 arose because the unifying purpose of full faith and credit sometimes was at odds with other values of federalism. The earliest examples of the Court withdrawing from simple application of section 1738 occurred when preclusion interfered with the sovereignty of a second state over matters that were historically of particularly local concern. A literal construction of section 1738 in such "state-state" litigation has yielded to the interest of the forum state in the matrimonial status of its

143. The statute stated that such authenticated records "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." Act of May 26, 1790, ch. 11, 1 Stat. 122.

144. Whitten, *supra* note 131, at 559-70.

145. *Mills*, 11 U.S. (7 Cranch) at 484.

146. *Id.*

147. *Hampton*, 16 U.S. (3 Wheat.) at 235.

148. *See Kremer*, 456 U.S. at 481-82; Riley v. New York Trust Co., 315 U.S. 343, 349 (1941).

149. Nadelman, *supra* note 131, at 60 n.124.

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

domiciliaries,[151] in ownership of property within its boundaries,[152] and in providing adequate compensation to injured resident workers.[153] More recently, the Court also has refused preclusive effect to state court judgments in state-federal litigation in which full faith and credit conflicts with a congressional scheme of federal remedies and federal court jurisdiction.[154]

These examples of full faith and credit yielding in both the state-state and the state-federal setting are significant to this Article's discussion of state-federal litigation under section 1983 because the same statutory language in section 1738 regarding application of the rendering state's law is at issue.[155] Thus, decisions that allow a degree of flexibility in applying the statute in state-state cases are relevant in interpreting the statute in a state-federal context. The Court has made similar ad hoc exceptions to the application of the rendering state's law in both state-state and state-federal litigation.

B. Prior Application of Full Faith and Credit: State-State Litigation

1. Jurisdiction

The earliest limitation placed on full faith and credit was the acknowledgement that a second court can inquire into the subject matter and territorial jurisdiction of the prior proceeding.[156] The familiar principle established in these decisions is that a judgment entered by a court without jurisdiction is void and can be attacked collaterally in other courts. The significant point is that the concept of jurisdiction employed in these cases went beyond the domestic rules of jurisdiction of the first forum. If a state court had violated its own jurisdictional rules, it would not afford the judgment res judicata effect; therefore consistent with section 1738, no other court would have to defer to it.

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151. *See* Williams v. North Carolina, 325 U.S. 226 (1945); *infra* text accompanying notes 164-81.

152. *See* Williams v. North Carolina, 317 U.S. 287, 294 n.5 (1942). The Court noted:

> *Fall v. Eastin*, 215 U.S. 1; *Olmstead v. Olmstead*, 216 U.S. 386; *Hood v. McGehee*, 237 U.S. 611 . . . refuse to require courts of one state to allow acts or judgments of another to control the disposition or devolution of realty in the former; They seem to rest on the doctrine that the state where the land is located is "sole mistress" of its rules of real property. See *Hood v. McGehee, supra*, p. 615; and the concurring opinion of Mr. Justice Holmes in *Fall v. Eastin, supra*, p. 14.

153. *See* Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); *infra* text accompanying notes 182-206.

154. Brown v. Felsen, 442 U.S. 127 (1979) (*infra* text accompanying notes 220-24); England v. Louisana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (*infra* text accompanying notes 225-34).

155. The implementing statute is usually the basis for decisions involving the full faith and credit consequences of a state judgment regardless of whether the second proceeding is in a state or federal court. The statute is the *only* source governing federal courts; the constitutional clause only mandates that state courts defer to sister state judgments. *See* U.S. CONST. art. IV, § 1. It has been debated whether the constitutional clause is self-effectuating—whether in the absence of § 1738 a state court would be bound to provide full faith and credit to another state's judgment. Resolution of that question is not significant in this discussion because the Supreme Court has not differentiated between the constitutional clause and § 1738 in its rulings on recognition of judgments. The distinction may be important in choice of law questions because, unlike the constitutional clause, the original version of § 1738 did not require deference to the laws of a sister state.

156. *See* Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839).

Rather than relying on this simplistic application of full faith and credit, however, these early decisions relied on a common-law concept of jurisdiction to test the authority of the first court to act.

In *D'Arcy v. Ketchum*[157] a New York state court entered judgment against a nonparticipating defendant on the basis of a New York statute that permitted judgment against all joint debtors if any one of them could be subjected to service of process. An action was brought against D'Arcy in federal court in Louisiana to collect on the New York judgment; he defended on the ground that the judgment should be given no effect because it was entered without jurisdiction over him. New York law clearly authorized the exercise of jurisdiction over D'Arcy and would have accorded the judgment prima facie evidentiary weight in a subsequent collection action. The Supreme Court, however, concluded the New York judgment should be given no effect because it violated a principle of "international law" that required that a defendant be served with process or appear voluntarily.[158]

Jurisdictional decisions like *D'Arcy* would be justified today under the constitutional principle that the due process clause of the fourteenth amendment limits the territorial jurisdiction of state courts. A second court need not give full faith and credit to a judgment entered in violation of the Constitution. No constitutional restrictions on state court jurisdiction, however, existed at the time that *D'Arcy* was handed down. The fourteenth amendment was not ratified until 1868[159] and the due process clause was not recognized as a limitation on state court jurisdiction until *Pennoyer v. Neff*[160] in 1878.

How did the Court rationalize this precondition for full faith and credit? No reference to a jurisdictional limitation on full faith and credit appears in the statute, the constitutional clause, or the congressional debates prior to ratification. The Supreme Court, however, concluded that these jurisdictional limitation principles were known at the time of the Constitutional Convention and that the drafters would have been more explicit if they had intended the clause and statute to abolish them.[161]

Thus, the concept of limited jurisdiction was derived from notions of state sovereignty within a federal system. A state's paramount interest in determining the legal status of its citizens and the ownership of property within its boundaries could not be usurped by another state's judicial proceedings. This

157. 52 U.S. (11 How.) 165 (1850).

158. *Id.* at 176.

159. U.S. CONST. amend. XIV, § 1; G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW B-11 (10th ed. 1982).

160. 94 U.S. 714 (1878).

161. *See D'Arcy*, 52 U.S. (11 How.) at 186:

> Subject to this established principle of personal service of process, Congress also legislated; and the question is, whether it was intended to overthrow this principle, and to declare a new rule, which would bind the citizens of one state to the laws of another; as must be the case if the laws of New York bind this defendant in Louisiana. There was no evil in this part of the existing law, and no remedy called for, and in our opinion Congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the state where made.

jurisdictional limitation was the basis for avoiding decrees that adjudicated ownership of real estate located in another state[162] and that probated the estate of a decedent domiciled in another state.[163]

2. Divorce

The Supreme Court's treatment of "migratory" divorce decrees is a good example of the manipulation of the common-law jurisdiction concept. Although rationalized as a jurisdictional issue, the refusal to give preclusive effect to another state's divorce decree has been premised on concern that full faith and credit would interfere with the forum state's right to determine the matrimonial status of its own domiciliaries.[164]

The friction between full faith and credit and state sovereignty over marriage and divorce was greatest when a few states offered relatively simple no-fault divorces while the majority of states had restrictive requirements.[165] For example, if a spouse established the brief residence required in Nevada for purposes of its divorce statutes and obtained a divorce decree, would other states have to give the divorce full recognition? If so, the divorce policies in the more restrictive states would have been undermined and watered down to the standards of the more lenient states. If not, on what basis could another state refuse full faith and credit to a Nevada divorce?

Prior to 1942 the Supreme Court had denied full faith and credit to divorces in which the petitioning party left the marital home and obtained an *ex parte* divorce in another state. For the decree to receive extraterritorial effect, service on the defendant had to be accomplished in the forum state or the rendering state had to be either the domicile of the defendant or the matrimonial domicile.[166] Thus, the Court protected the autonomy of the marital domicile state to regulate the grounds and terms of the dissolution of marriage by denying full faith and credit to decrees based solely on the establishment of domicile by the plaintiff.[167]

The doctrinal basis for avoiding full faith and credit was the in rem[168]

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162. *See* Fall v. Eastin, 215 U.S. 1 (1909).

163. *See* Tilt v. Kelsey, 207 U.S. 43 (1907).

164. *See* Sumner, *Full Faith and Credit for Divorce Decrees—Present Outline and Possible Changes*, 9 VAND. L. REV. 1, 1-11 (1955); *see also* Foster & Freed, *Modification, Recognition and Enforcement of Foreign Alimony Orders*, 11 CAL. W.L. REV. 280 (1975) (noting similar reluctance on the part of nations to yield jurisdiction over their citizens' alimony orders).

165. Sumner, *supra* note 164, at 2-3.

166. Haddock v. Haddock, 201 U.S. 562 (1906), *overruled*, Williams v. North Carolina, 317 U.S. 287 (1942); Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901).

167. *See* Sumner, *supra* note 164, at 2.

168. A proceeding in rem is an action that seeks an adjudication regarding the status or ownership of a *res* rather than a determination of personal liability as in an in personam action. Traditionally, jurisdiction in an in personam action could be obtained when the defendant was present in the state for service of process or appeared voluntarily. Pennoyer v. Neff, 94 U.S. 714 (1877). Jurisdiction in an in rem action was premised on the presence of the property in the state, without regard to the presence or absence of the owner of the property. Arndt v. Griggs, 134 U.S. 316 (1890). When the *res* was intangible property, such as a debt or a legal relationship such as marriage, jurisdiction depended on the fictional presence of the *res* in the forum state. Harris v. Balk, 198 U.S. 215 (1905) (a debt is present and subject to garnishment wherever a debtor may go;

characterization of a divorce proceeding. The marital status of the parties—the *res* over which the rendering court must have jurisdiction—did not necessarily travel with the deserting spouse. The marital *res* remained in the original state of domicile; a divorce action could be brought only in that state if the innocent party remained in the state of marital domicile and could not be served in another state.[169] This domicile requirement—like the jurisdiction exceptions to full faith and credit—was not derived from the Constitution but from the common law.[170]

The Supreme Court's 1942 decision in *Williams v. North Carolina* (*Williams I*)[171] marked a shift in the treatment of full faith and credit that reflected changing attitudes toward divorce. Although the earlier cases had applied jurisdictional concepts to protect the sovereignty of states in dictating divorce policies, *Williams I* and later decisions exhibited concern for the rights of individuals subject to overly restrictive divorce laws.[172] Full faith and credit was employed increasingly to require deference to sister state divorce decrees.[173] These later cases still conceptualized the marital status as a *res*, but one that is present in the state of domicile of either spouse. Once a party established a good faith domicile in a state other than that of the prior marital home, the second state had jurisdiction to entertain a divorce action.

Thus, the focus of full faith and credit disputes under the modern approach is the determination of good faith domicile. Subsequently, in *Williams v. North Carolina* (*Williams II*),[174] the Court considered the circumstances under which North Carolina, the state of original marital domicile, must give full faith and credit to a determination by a Nevada court that a spouse's six-week stay in that state established domicile.[175] The opinion by Justice Frank-

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now limited by the fairness standard imposed by Shaffer v. Heitner, 433 U.S. 186 (1976); International Shoe Co. v. Washington, 326 U.S. 310 (1945)); Andrews v. Andrews, 188 U.S. 14 (1903) (the marriage does not travel with a deserting spouse who establishes residence in another state).

169. *See* Andrews v. Andrews, 188 U.S. 14, 39 (1903). Haddock v. Haddock, 201 U.S. 562 (1906), demonstrates the manipulability of such a legal fiction. The Court held that the marital *res* may travel from the state of marital domicile when it is the "innocent" party who is forced to move to another state. The *Haddock* reasoning was repudiated in Williams v. North Carolina, 317 U.S. 287 (1942).

170. Justice Frankfurter in Williams v. North Carolina, 325 U.S. 226 (1945), stated that "since 1789 neither this Court nor any other court in the English speaking world has questioned the domicile requirement for jurisdiction." *Id.* at 229.

171. 317 U.S. 287 (1942).

172. Sumner, *supra* note 164, at 2-3.

173. *See, e.g.*, Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951); Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. North Carolina, 325 U.S. 226 (1945).

174. 325 U.S. 226 (1945).

175. *Williams I* reversed a bigamy conviction in North Carolina on the ground that the North Carolina court had failed to give full faith and credit to an *ex parte* Nevada divorce decree. Defendants were North Carolina residents who had traveled to Nevada, stayed in a motel for the requisite six weeks to establish Nevada residency, and obtained *ex parte* divorces from their respective North Carolina spouses. They married in Nevada immediately after the divorces and returned to North Carolina to live. *Williams I*, 317 U.S. at 289-90. The subsequent marriage of defendants would not have been considered bigamous in North Carolina if the Nevada decree had been valid. Subsequent to *Williams I*, a retrial occurred in which the issue of defendant's bona fide domicile in Nevada was submitted to the jury.

On remand, the jury was instructed that the Nevada finding of jurisdiction, made without

furter exemplified the process of accommodation used by the Court to reconcile the conflict between the command of section 1738 and North Carolina's authority over the marital status of its domiciliaries.

The majority in *Williams II* concluded that North Carolina could refuse to recognize a Nevada divorce even though it comported with Nevada's jurisdictional statutes as well as the constitutional requirements of the due process clause.[176] The precedential support for this ruling was the earlier jurisdiction cases, but the method of analysis reached an accommodation of the interests of North Carolina and Nevada.

> "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" . . . and do not belong to the United States."[177]

North Carolina could apply its own policies regarding divorce and remarriage rather than defer to those of Nevada as long as defendants continued to be domiciled in North Carolina. The Court refused to apply the literal command of section 1738 because "the policy of each State in matters of most intimate concern could be subverted by the policy of every other State."[178] The fact that Nevada's policies were embodied in the form of a judgment of divorce did not dictate acquiescence by the North Carolina courts.

Williams II posed a dilemma because both states asserted a domicile relationship with defendants. The Nevada decree made an *ex parte* finding that plaintiffs in the divorce actions were domiciled in Nevada. On the other hand, in the subsequent bigamy prosecution a North Carolina jury found that defendants remained domiciliaries of North Carolina because they never intended to remain in Nevada beyond the waiting period for a divorce. Justice Frankfurter concluded that a North Carolina court could reexamine the Nevada finding of domicile because it was a "jurisdictional fact" subject to review by the second forum, but North Carolina must treat the Nevada finding of domicile as prima facie evidence in the second proceeding.[179] Justice Frankfurter's balancing of interests, without reference to the early debates regarding section 1738, effectively afforded evidentiary weight, but not conclusive effect, to the Nevada judgment on the domicile issue.

When a second court determines that the first forum lacked jurisdiction,

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appearance or contest by defendants, was prima facie but not conclusive evidence of defendants' domicile in Nevada. In this second proceeding, the jury determined that defendants had not established bona fide domicile in Nevada and, therefore, that the Nevada decree was not valid because it was entered without jurisdiction. The jury returned a guilty finding on the charge of bigamous cohabitation in North Carolina. Defendants unsuccessfully appealed their conviction through the North Carolina courts and the United States Supreme Court granted certiorari. Williams v. North Carolina, 322 U.S. 725 (1943).

176. *Williams II*, 325 U.S. at 239.

177. *Id.* at 232-33 (quoting Popovici v. Agler, 280 U.S. 379, 383-84 (1930)); *see also In re* Burrus, 136 U.S. 586, 593-94 (1890)).

178. *Williams II*, 325 U.S at 231.

179. *Id.* at 232, 235-36.

as the lower court did in *Williams II*, that determination creates the possibility of conflicting judgments in the two actions. The second court may ignore the first judgment completely and need not give the prior proceeding any claim or issue preclusion effect. The first court, however, may stand by its ruling and may give effect to it within that court's territorial boundaries if it meets due process standards.[180]

The application of the jurisdiction exception to section 1738 and the possibility of such inconsistent rulings is limited by the principle of issue preclusion accorded to *contested* determinations of subject matter and territorial jurisdiction made by the first court. In *Williams II* the North Carolina court was required to give prima facie, but not conclusive, effect to the Nevada court's finding of Nevada domicile because the North Carolina spouses did not participate in the Nevada proceedings. Whenever the issue of jurisdiction actually is litigated and determined in the first proceeding, it is given conclusive effect in any collateral attack.[181]

3. Workers' Compensation[182]

The Supreme Court's treatment of workers' compensation awards reflects a similar deference to the interest of a second state to adequately compensate resident workers who are injured in the course of employment. The Court, however, has been unable to develop a satisfactory conceptual basis—such as jurisdiction—to justify these workers' compensation decisions that stand as further exceptions to full faith and credit.

In *Thomas v. Washington Gas Light Co.*,[183] a case decided six months prior to *Allen*, the Supreme Court upheld an award of supplemental benefits under a workers' compensation scheme in an action that would have been precluded by a literal application of section 1738. The possibility of supplemental benefits arises because more than one state may have jurisdiction to award benefits. Plaintiff Thomas resided in the District of Columbia and was

180. The Court recognized in *Williams II* that a Nevada court could determine that Williams was domiciled in Nevada and the Nevada divorce decree would be valid within that state. *Id.* at 232. At the same time, a North Carolina court could decide that Williams remained a North Carolina resident and could be considered still married for purposes of the bigamy prosecution in that state. The Court concluded that North Carolina's interest in determining the marital status of its domiciliaries was sufficiently important to permit conflicting judgments despite this inconsistency in the face of the unifying purpose of the full faith and credit clause and statute. *Id.* at 231-32; *id.* at 241-42 (Murphy, J., concurring).

181. The Court in *Williams II* reserved the question of the effect of a finding of domicile "squarely litigated in a truly adversary proceeding." *Id.* at 230 n.6. Subsequent decisions have applied issue preclusion to contested determinations of domicile and have not permitted a second forum to relitigate the jurisdiction issue. *See* Sherrer v. Sherrer, 334 U.S. 343, 351-52 (1940).

182. For a discussion of workers' compensation as it relates to preclusion and full faith and credit, see generally Cheatham, *Res Judicata and the Full Faith and Credit Clause:* Magnolia Petroleum Co. v. Hunt, 44 COLUM. L. REV. 330 (1944); Reese & Johnson, *supra* note 129, at 158-60; Sterk, *Full Faith and Credit, More or Less to Judgments: Doubts About* Thomas v. Washington Gas Light Co., 69 GEO. L.J. 1329 (1981); Wolkin, *Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern*, 92 U. PA. L. REV. 401 (1944); Note, *The Scope of the Full Faith and Credit Clause in Successive Worker's Compensation Awards*, Thomas v. Washington Gas Light Co., 4 W. NEW ENG. L. REV. 479 (1982).

183. 448 U.S. 261 (1980).

hired there by his employer. He worked in both the District of Columbia and in Virginia, and his injury occurred while on a job in Virginia. The compensation boards in both jurisdictions had jurisdiction to award benefits because of his connections with Virginia and the District of Columbia.[184]

Plaintiff initially obtained a compensation award in Virginia by virtue of an agreement with his employer. That award was conclusive under Virginia law as to any claims that he had against the employer arising out of the same accident. Plaintiff filed for a supplemental award in the District of Columbia when he became aware that the statutory benefits there were higher that those in Virginia. A lower federal court denied the claim for supplemental benefits on the basis of full faith and credit.[185] The Supreme Court reversed, holding that successive workers' compensation proceedings are an exception to section 1738's mandate to apply Virginia law. No majority of justices, however, could join in a single opinion that reconciled this exceptional treatment with the language of section 1738.[186]

The justices were divided both in their reading of section 1738 and in their views of two prior decisions that originally had established the peculiar relaxation of full faith and credit in workers' compensation cases. In *Magnolia Petroleum Co. v. Hunt*,[187] a five-to-four decision, the Court had ruled that section 1738 and Texas res judicata principles precluded Louisiana from granting benefits under its compensation scheme to supplement awards made in Texas.[188] The *Magnolia* decision was undermined significantly, but not overruled, four years later in *Industrial Commission v. McCartin*.[189] In *McCartin* a unanimous Court permitted an employee to recover a supplemental award in

184. *Id.* at 279.

185. An Administrative Law Judge and a Review Board of the United States Department of Labor found Thomas eligible for supplemental benefits. 9 BEN. REV. BD. SERV. (MB) 760 (1978). The United States Court of Appeals for the Fourth Circuit reversed, Washington Gas Light Co. v. Thomas, 598 F.2d 617 (4th Cir. 1978), *rev'd*, 448 U.S. 261 (1980), relying on Pettus v. American Airlines, Inc., 587 F.2d 627, 630 (4th Cir. 1978). *Pettus* had barred recovery under similar facts because of full faith and credit. *Thomas*, 448 U.S. at 264-66.

186. The plurality opinion of Justice Stevens, joined by Justices Brennan, Stewart, and Blackmun, concluded that a supplemental award was permissible because the interest the District of Columbia had to provide additional benefits outweighed the interest Virginia had to limit recovery to the original Virginia award. *Thomas*, 448 U.S. at 263-86. Three justices (White, Powell, and Burger) concurred in the result on the basis of stare decisis and the Court's opinion permitting a supplemental award in Industrial Comm'n of Wisconsin v. McCartin, 330 U.S. 622 (1947). The concurring justices, however, did not accept the plurality's approach of balancing the respective interests of the two forums. *Thomas*, 448 U.S. at 286-90 (White, J., concurring). Justices Rehnquist and Marshall dissented on a strict reading of full faith and credit in workers' compensation cases as presented in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). *Thomas*, 448 U.S. at 290-96 (Rehnquist, J., dissenting). *See supra* notes 192-205 and accompanying text.

187. 320 U.S. 430 (1943).

188. The majority concluded that this was compelled by the Texas provision of law that a recovery of workers' compensation for an injury precludes another claim against the employer arising out of the same injury. *Id.* at 435-36. The *Magnolia* opinion recognized that the state-law-governs command of the constitutional clause and § 1738 may not be "all-embracing, and that there may be exceptional cases in which the judgment of one state may not override the laws and policies of another . . . ." *Id.* at 438. The majority, however, concluded that compensation awards, just as money damages in civil suits, generally do not raise any such policy problems, particularly when the claimant had the initial choice between the state forums. *Id.* at 444.

189. 330 U.S. 622 (1947).

Wisconsin after a settlement with his employer under Illinois law. The Court concluded that a compensation award must be given full faith and credit by another state only when the rendering state's workers' compensation scheme includes "some unmistakable language by a state legislature or judiciary" to warrant a construction that it is "designed to preclude any recovery by proceedings brought in another state."[190]

McCartin and *Magnolia* coexisted for over thirty years despite their practical and conceptual inconsistency. *McCartin* effectively allowed supplemental awards despite *Magnolia*'s literal reading of section 1738 because few workers' compensation statutes contain the "unmistakable language" required to give an award preclusive effect.[191]

A plurality of justices in *Thomas* voted to permit supplemental awards, but wished to replace the *McCartin* "unmistakable language" test with an accommodation of interests approach. Justice Stevens, writing on behalf of four justices, concluded that a "straightforward application of full faith and credit" must yield because the significant interest of the District of Columbia in providing adequate compensation to the injured worker outweighed both the employer's interest in limiting its liability and Virginia's interest in the integrity of its tribunal's determination.[192] The plurality referred to three characteristics of workers' compensation proceedings that supported the conclusion that a supplemental proceeding in the District of Columbia did not seriously jeopardize the sovereignty of Virginia's Industrial Commission: (1) no real conflict existed between the District of Columbia providing supplemental benefits and the findings by the Virginia Commission because issue preclusion would be applied to determinations made by the Commission;[193] (2) the limited jurisdiction of a workers' compensation tribunal—its inability to award benefits under other states' laws—distinguishes its rulings from those of state courts of general jurisdiction that can consider the applicability of another state's statutes and causes of action;[194] and (3) an injured worker often does not exercise

190. *Id.* at 627-28. The Illinois settlement agreement in *McCartin* provided that it would not " 'affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin.' " *Id.* at 624 (quoting settlement contract provision). Presumably, the Court could have relied upon this provision to distinguish *Magnolia* and to preserve the employee's claim for supplemental benefits under Wisconsin law; instead, the opinion set forth the broader rationale quoted in the text. The Court concluded that the reservation of rights in the Illinois settlement agreement was consistent with what was implicit in the Illinois Act itself—that awards in Illinois are not intended to foreclose additional awards under the laws of other states. *Id.* at 627-29.

191. *See Thomas*, 448 U.S. at 275 n.21 (only Nevada has "unmistakeable language").

192. *Id.* at 280, 283-85.

193. *Id.* at 281. "A supplemental award gives full effect to the facts determined by the first award and also allows full credit for payments pursuant to the earlier award. There is neither inconsistency nor double recovery." *Id.*

194. It was considered inappropriate to apply merger or claim preclusion to the award of benefits under Virginia law because of this limitation on the jurisdiction of a workers' compensation tribunal:

> Full faith and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make. Since it was not requested, and had no authority, to pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights.

an informed, voluntary choice of forum.[195]

The analysis employed by the plurality is reminiscent of Justice Frankfurter's majority opinion in *Williams II*. Justice Stevens considered the nature of the proceeding, the interests of the individual litigants, and the interests of the respective sovereigns. Justice Stevens attempted to strike an accommodation to provide plaintiff with adequate compensation while also doing the least violence to full faith and credit principles.[196] This would serve to further the interests of both plaintiff and the District of Columbia.

The dissenting opinion of Justice Rehnquist, joined by Justice Marshall,[197] contrasted most sharply with the plurality approach. The dissent rejected the balancing of interests approach as without precedent in the full faith and credit context, and criticized the particular analysis of interests by the plurality as undervaluing and overlooking important concerns of Virginia once it had expended resources to resolve the dispute between an employer and an employee.[198] Justice Rehnquist, although acknowledging that there are some "exceptional judgments" that are not entitled to full faith and credit, noted that such exceptions are " 'few and far between' "[199] and do not support a reading of full faith and credit that authorizes the Court to conduct a balancing of the two states' interests.[200]

Justice White's concurrence, joined by Justice Powell and Chief Justice Burger, agreed with the plurality that a supplemental award should be permitted, but disagreed with the balancing of interests rationale. These justices expressed concern that the plurality's approach would undermine full faith and credit in areas other than workers' compensation so that whenever a former judgment is pleaded the court would be obliged to balance the various state interests involved. The concurrence found this approach objectionable be-

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Id. at 282-83.

195. The Court noted:

> Compensation proceedings are often initiated informally, without the advice of counsel, and without special attention to the choice of the most appropriate forum. Often the worker is still hospitalized when benefits are sought as was true in this case. And indeed, it is not always the injured worker who institutes the claim. . . . This informality is consistent with the interests of both States. A rule forbidding supplemental recoveries under more favorable workmen's compensation schemes would require a far more formal and careful choice on the part of the injured worker than may be possible or desirable when immediate commencement or benefits may be essential.

Id. at 284-85.

196. *Id.* at 285-86.

197. It is striking that Justice Marshall joined with Justice Rehnquist in an opinion adopting a strict reading of § 1738. Marshall consistently had supported a flexible application of § 1738 in civil rights actions as a dissenter in *Allen* and *Kremer* and as the author of the unanimous opinion in *Haring*. Justice Marshall's dissent in *Thomas* presumably reflects a difference in his attitude toward the policies that are in conflict with full faith and credit. In his view, the interest of a second state in providing a supplemental workers' compensation award is not sufficient to question application of full faith and credit, but the federal policies behind provision of a federal forum in Title VII and § 1983 suits are more compelling.

198. *Id.* at 292-93 (Rehnquist, J., dissenting).

199. *Id.* at 295 (Rehnquist, J., dissenting) (quoting Williams v. North Carolina, 317 U.S. 287, 295 (1942)).

200. *Id.* at 296 (Rehnquist, J., dissenting).

cause it would constitute a "wide-ranging reassessment of the principles of full faith and credit"[201] and would place the second court, evaluating a full faith and credit defense, in a position to give "controlling weight to its own parochial interests."[202]

The *McCartin* rationale troubled the concurring justices. They believed that the majority opinion in *Magnolia* was "sounder doctrine,"[203] but were reluctant to overrule *McCartin* because it had guided state and federal courts for more than thirty years.[204] Thus, they would not join either the plurality or the dissenters; the plurality opinion did too much violence to full faith and credit principles and the dissent underestimated the value of stare decisis. In choosing what they perceived to be the lesser of evils, the concurring justices wanted to leave both *McCartin* and *Magnolia* in place because the *McCartin* exception to full faith and credit is limited to workers' compensation cases.

Presumably, *Thomas* is not the final word on section 1738 and workers' compensation proceedings. The three concurring justices in *Thomas* indicated their willingness to reassess full faith and credit principles with the benefit of briefs and arguments directed to the issue.[205] For the moment, however, *Thomas* is an ad hoc exception to section 1738 that reflects the peculiar and sympathetic nature of workers' compensation proceedings and the relatively minor intrusion into the purpose of full faith and credit that supplemental awards constitute.

Unlike the jurisdiction exception, which permits a second court to ignore the first proceeding and enter an inconsistent judgment, the workers' compensation decisions require fidelity to the specific findings of the prior proceeding. A second state may not relitigate issues of fact or liability that might result in awarding benefits when a first state has denied compensation.[206] Thus, the workers' compensation exception to the application of the merger aspect of claim preclusion has no effect on the issue preclusion consequences of a prior proceeding.

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201. *Id.* at 288 (White, J., concurring).

202. *Id.* at 289 (White, J., concurring).

203. *Id.* (White, J., concurring).

204. *Id.* (White, J., concurring).

205. *Id.* at 288 (White, J., concurring). Justice White noted:

> Hence the plurality's rationale would portend a wide-ranging reassessment of the principles of full faith and credit in many areas. Such a reassessment is not necessarily undesirable if the results are likely to be healthy for the judicial system and consistent with the underlying purposes of the Full Faith and Credit Clause. But at least without the benefit of briefs and arguments directed to the issue, I cannot conclude that the rule advocated by the plurality would have such a beneficial impact.

Id.

It appeared that the Court was prepared to readdress the issues that divided it in *Thomas* when it granted certiorari in 1983 to review an award of supplemental benefits. Roadway Express, Inc. v. Warren, 163 Ga. App. 759, 295 S.E.2d 743 (1982), *cert. granted*, 103 S. Ct. 1873 (1983), *cert. withdrawn*, 104 S. Ct. 476 (1983). The Court, however, subsequently dismissed the writ as improvidently granted. 104 S. Ct. 476 (1983).

206. *Thomas*, 448 U.S. at 280-81; *id.* at 287 (White, J., concurring).

C. *Prior Application of Full Faith and Credit: State-Federal Litigation*

Full faith and credit has yielded on several occasions when deference to a state court judgment would conflict with a congressional scheme of federal remedies and federal jurisdiction.[207] The subordination of preclusion principles to other federal policies is similar to the balancing and accommodation of interests analysis in the state-state cases. These federal examples, however, are less definitive as "exceptions" to full faith and credit because the opinions have not addressed the applicability of section 1738. Unlike the state-state cases in which the constitutional clause and the statute have been addressed directly, the federal cases generally have viewed the issue as a conflict between federal principles of preclusion[208] and a congressional statute that establishes a federal cause of action and federal jurisdiction, such as the Bankruptcy Act.[209] The cases, however, have concluded freely that the common-law preclusion doctrine should yield to the congressional intent to provide a federal forum.[210]

The clearest examples of the flexible application of preclusion when it has conflicted with federal policies are cases construing exclusive jurisdiction statutes such as bankruptcy,[211] patent and copyright,[212] and antitrust statutes.[213] These federal exceptions, however, are not limited to exclusive jurisdiction situations, but also are recognized when there is concurrent jurisdiction in state and federal courts and a clear federal interest in providing a litigant the option of a federal forum.[214]

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207. *See* Brown v. Felsen, 442 U.S. 127 (1979); England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964); Kalb v. Feuerstein, 308 U.S. 433 (1940).

208. "Federal principles of preclusion" refers to the common-law doctrines of claim and issue preclusion as they have evolved in the federal court system. When the prior judgment was rendered by a federal court and a second federal court considers the effect that proceeding has on a subsequent suit (federal-federal litigation), § 1738 and the constitutional clause are not applicable. Full faith and credit requires deference to state rules of preclusion only when the prior judgment emanates from a state court. The second court applies federal common-law preclusion principles in federal-federal litigation, just as a state court applies its own rules of preclusion to subsequent litigation within that same jurisdiction. RESTATEMENT, *supra* note 1, § 87 comment a.

209. 11 U.S.C. §§ 101-151326 (1982). *See infra* text accompanying notes 220-24.

210. The *Allen* decision was the first instance of a state-federal case analyzed as an implied repeal issue—whether the federal statute under which the action was brought (§ 1983) was intended by Congress as an implied repeal of § 1738. *See supra* text accompanying notes 40-43. Commentators have noted that this implied repeal analysis is a marked departure from the approach in prior state-federal cases and therefore have interpreted *Allen* and *Kremer* as apparent signals of less sympathy for implying exceptions to full faith and credit. 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4470 (Supp. 1983).

211. 11 U.S.C. §§ 101-151326 (1982). The Bankruptcy Act is discussed along with Kalb v. Feuerstein, 308 U.S. 433 (1940) and Brown v. Felsen, 442 U.S. 127 (1979), *infra* notes 217, 220-24 and accompanying text.

212. 35 U.S.C. §§ 1-376 (1982).

213. 15 U.S.C. §§ 1-402 (1982). Judge Learned Hand's opinion in Lyons v. Westinghouse Elec. Co., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), is commonly cited as an example of the accommodation of preclusion principles and the interest in a federal forum for antitrust cases.

214. Montana v. United States, 440 U.S. 147, 163 (1979) (discussed *infra* text accompanying notes 235-42); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 418 (1964) (discussed *infra* text accompanying notes 225-34).

1. Exclusive Jurisdiction[215]

The jurisdiction of the federal courts generally is concurrent with that of state courts; claims under federal statutes such as section 1983 may be brought in either state or federal court. In a few instances, however, Congress has created statutory actions that may be brought *only* in federal court. Such a grant of exclusive jurisdiction to the federal courts allows greater uniformity of interpretation by judges with particular expertise in proceedings using federal procedural standards.[216]

A state court may not exercise jurisdiction over a claim that falls within the exclusive jurisdiction of the federal courts. A federal statute may even preclude state consideration of state-law claims in rare situations that involve issues or defenses that relate to an exclusively federal claim. Determinations by the state court need not be given full faith and credit in such cases.[217]

In most instances, however, a grant of exclusive federal jurisdiction does not preclude a state court from considering issues or facts that may be relevant to the federal claim when they arise in the context of a state-law claim that is within the state court's jurisdiction. In an action to enforce a contract under state law a state court may be faced with a defense that the contract should not be enforced because it constitutes a restraint of trade in violation of state antitrust laws. Should the state court's conclusions or findings of fact be given conclusive effect in a subsequent federal court action on an exclusive jurisdiction claim? The federal interest is in direct conflict with the section 1738 mandate to give effect to state rules of preclusion in such cases.[218]

The Supreme Court has not resolved this conflict for all exclusive juris-

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215. For discussions of the application of preclusion in exclusive jurisdiction cases based on prior state proceedings, see generally 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 210, § 4470 (1981); Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281 (1978); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Determinations*, 53 VA. L. REV. 1360 (1967).

216. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 210, § 4470 (extensive discussion of the advantages of exclusive federal jurisdiction over certain actions in antitrust, patent, securities, and other areas); *see also* Brown v. Felsen, 442 U.S. 127, 136 n.7 (1979) (statement by Professor Lawrence King on the need to create a federal bankruptcy court so that its judges could develop special expertise).

217. Kalb v. Feuerstein, 308 U.S. 433 (1940). In *Kalb* petitioner in a federal bankruptcy proceeding was defendant in a state court proceeding to foreclose a mortgage on his farm. *Id.* at 435. The Supreme Court ruled that the language and policy of the Bankruptcy Act demonstrated Congress' intent to deprive state courts of jurisdiction over such foreclosures during the pendency of the federal bankruptcy action. *Id.* at 438-44.

The state court in *Kalb* had determined that it had jurisdiction over the foreclosure proceedings, a finding that usually would be given preclusive effect. *Id.* at 437. *See* Stoll v. Gottlieb, 305 U.S. 165 (1938). The Supreme Court concluded that the usual rule of preclusion regarding jurisdictional findings by state courts had to yield to accomplish Congress' purposes of exclusive federal jurisdiction for bankruptcy actions. *Kalb*, 308 U.S. at 438-40, 444.

218. In Lyons v. Westinghouse Elec. Co., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), Judge Learned Hand concluded that preclusion should not be applied in a similar situation. The Supreme Court has not addressed this issue and lower federal courts have been divided in their adherence to claim or issue preclusion in such circumstances. *See* cases cited in 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 210, § 4470 (1981); Note, *The Res Judicata Effect of Prior State Court Judgments*, 51 FORDHAM L. REV. 1374 (1983).

diction cases.[219] It would be inappropriate to do so as an across-the-board proposition because the reconciliation of full faith and credit and an exclusive jurisdiction statute depends on the particular purposes of the statute and the extent to which preclusion would intrude upon those purposes.

Brown v. Felsen,[220] a federal bankruptcy proceeding, is a good example of the particularized treatment of preclusion issues in an exclusive jurisdiction case. In *Brown* a creditor sought to establish that the bankrupt's debt was not dischargeable under section 17(a) of the Bankruptcy Act[221] because it was the product of fraud by the debtor. The bankrupt contended that claim preclusion barred this assertion of fraud because a prior state court proceeding had given judgment on the debt to the creditor, without allegations or findings of fraud. Thus, the bankrupt argued that the merger principle of claim preclusion should bar litigation of new matters that could have been contested in the state proceeding.

The Supreme Court ruled that claim preclusion should not be applied in proceedings to determine whether a debt is dischargeable. To give finality to state proceedings "would undercut Congress' intention to commit [section] 17

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219. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 668 (1978) (Burger, C.J., dissenting); *id.* at 674 (Brennan, J., dissenting). In Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929), the Supreme Court ruled that a party to a patent infringement proceeding in federal court could be estopped by findings of fact made by a state court adjudicating a state-law claim of breach of contract and fiduciary duty. *Id.* at 391. *Becher* has been construed narrowly by lower federal courts to apply to purely factual findings by state courts. This construction allows litigation of mixed questions of fact and law as well as federal legal issues in the federal proceeding. For example, see Judge Learned Hand's influential opinion in Lyons v. Westinghouse Elec. Co., 222 F.2d 184, 188 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955). *Becher* has been ignored for the most part by the Supreme Court—in the recent case of Will v. Calvert, 437 U.S. 655 (1978), which referred to the general issue of preclusion and exclusive jurisdiction, *Becher* was not considered as governing. Four of the justices identified as an open question whether it is "ever appropriate to accord res judicata effect to a state-court determination of a claim over which the federal courts have exclusive jurisdiction." *Id.* at 674 (Brennan, J., dissenting). *See also id.* at 668 (Burger, C.J., dissenting). Justice Brennan, on behalf of three of the four justices, expressed "serious doubt" that res judicata effect ever would be appropriate in these cases, *id.* at 674 (Brennan, J., dissenting); he reasoned that federal courts always should be able to consider purely legal questions de novo and even questioned the limited fact finding preclusive effect that *Becher* upheld:

> It is at least arguable that, in creating and defining a particular federal claim, Congress assumed that the claim would be litigated only in the context of federal-court procedure—a fair assumption when the claim is within exclusive federal jurisdiction. For example, Congress may have thought the liberal federal discovery procedures crucial to the proper determination of the factual disputes underlying the federal claim.

Id. at 675 (Brennan, J., dissenting).

Neither the Burger nor Brennan opinions referred to *Becher* in discussing these "unresolved and difficult" issues, but Brennan cited lower court opinions, including Judge Hand's decision in *Lyons*, to support de novo consideration of legal issues in claims under exclusive federal jurisdiction. *Id.* at 675 (Brennan, J., dissenting).

220. 442 U.S. 127 (1979).

221. 11 U.S.C. § 35(a) (1976) (current version at 11 U.S.C. § 532(a) (1982)):

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; . . . .

issues to the jurisdiction of the bankruptcy court."[222] The Court found that one of the purposes of the 1970 amendments to the Act was to "take these section 17 claims away from state courts that seldom dealt with the federal bankruptcy laws and to give those claims to the bankruptcy court so that it could develop expertise in handling them."[223] Application of claim preclusion, therefore, would run counter to this legislative purpose by abdicating federal court consideration when the bankruptcy petition was preceded by state court collection proceedings.

The *Brown* exception to full faith and credit, however, is narrowly drawn to fit the particular inconsistency between claim preclusion and the purpose of the 1970 amendment to section 17(a). Claim and issue preclusion generally are applicable to proceedings in bankruptcy, and "in the absence of countervailing statutory policy,"[224] a state judgment in section 17(a) proceedings will be given preclusive effect if the fraud issue actually was litigated and determined in state court.

2. Concurrent Jurisdiction

The Supreme Court has recognized exceptions to preclusion doctrine in cases of concurrent jurisdiction when evidence exists of congressional intent to provide litigants with a federal forum as an alternative to state court adjudication. The Court ruled in *England v. Louisiana State Board of Medical Examiners*[225] that a state court proceeding should not be given preclusive effect by a federal court when a federal plaintiff was forced to litigate issues in state court under the abstention doctrine announced in *Railroad Commission v. Pullman Co.*[226]

Plaintiffs in *England* were chiropractors who asserted fourteenth amendment challenges to application of the educational requirements of Louisiana's Medical Practice Act to their practice. The action in federal court was stayed, on the basis of *Pullman*, to permit a state court determination of whether chiropractors, as a matter of state law, were governed by the Act. The Louisiana state courts ruled that the educational requirements were applicable to chiropractors and were not unconstitutional. Thereafter, the federal action was dismissed on the ground that the state court judgment on the federal issues barred relitigation in federal court.[227]

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222. *Brown*, 442 U.S. at 135.

223. *Id.* at 136.

224. *Id.* at 139 n.10.

225. 375 U.S. 411 (1964).

226. Under the *Pullman* doctrine, a federal court refrains from acting on a federal suit when it contains unresolved questions of state law or construction of a state statute that might modify or avoid a federal constitutional issue. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See* 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 210, § 4242 (1978); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974). The federal court retains jurisdiction when it abstains, but stays federal proceedings until the plaintiff has litigated the state-law matters in state court. If disposition of the state-law issues by the state court does not avoid the federal question, the plaintiff then may reactivate the federal proceeding. *England*, 375 U.S. at 417.

227. 194 F. Supp. 521 (E.D. La. 1961) (three-judge court), *rev'd*, 375 U.S. 411 (1964).

The Supreme Court reversed and allowed plaintiffs to litigate their federal claims in federal court contrary to the usual preclusion principles.[228] The Court recognized a substantial interest on the part of litigants to have a federal court determine claims within the federal jurisdictional statutes.[229] The abstention doctrine is not inconsistent with this interest in a federal determination of federal issues—*Pullman* recognized the paramount role of state courts in adjudicating issues of state law, but it "implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."[230] The key element in the Court's opinion was the exercise of choice by the federal plaintiff. "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."[231]

The *England* exception applies a limited form of issue and claim preclusion to give effect to the choice of forum exercised by the federal plaintiff. If he "freely and without reservation"[232] submits his federal claim for decision by the state courts and has it decided there, he will be precluded from returning to federal court. If the plaintiff litigates only state-law issues in state court and reserves his federal claim, however, he will not be precluded from litigating the federal claim after completion of state proceedings.[233] In addition, if the federal plaintiff reserves his federal claim, the federal court may consider issues of fact as well as issues of federal law, despite any state court rulings on those factual issues.[234]

The Supreme Court's decision in *Montana v. United States*,[235] a case decided one year before *Allen*, reiterated the choice of forum principle of *England* in a procedural context similar to, but technically not involving, *Pullman* abstention. A contractor on a federal dam project in Montana challenged the constitutionality of a Montana gross receipts tax on public contractors in state court. Subsequently, the United States filed an action in federal court against the State of Montana raising the same issues. The federal action was stayed by stipulation of the parties pending resolution of the state court proceeding. In

228. The Supreme Court did not refer explicitly to either § 1738 or to preclusion doctrine. *England*, 375 U.S. at 422-23. The effect of the Court's ruling, which permitted a party in a state proceeding to reserve federal claims that arise out of the same dispute as the state suit, was contrary to the claim preclusion principle that would bar the subsequent litigation of claims that could have been brought in the former proceeding. RESTATEMENT, *supra* note 1, §§ 17-20.

229. " 'When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take jurisdiction. . . . The right of a party plaintiff cannot be properly denied.' " *England*, 375 U.S. at 415 (quoting Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909)).

230. *Id.* at 415-16.

231. *Id.* at 415.

232. *Id.* at 419.

233. A plaintiff's federal claim is not precluded even though he could have joined the federal claim in the state court action and therefore would be barred from raising the federal claim in federal court under usual claim preclusion doctrine. *See supra* note 3.

234. *England*, 375 U.S. at 417 n.8.

235. 440 U.S. 147 (1979).

that suit, the Montana Supreme Court ultimately ruled against the contractor, and concluded that the tax did not violate the Constitution.[236]

The United States sought to resume the action in federal district court, but the State of Montana raised a preclusion defense based on the Montana judgment. The United States Supreme Court concluded that issue preclusion was appropriate, despite the lack of identity of the parties to the two suits, because the United States had directed and financed the state court suit on behalf of the contractor litigant.[237] The Court recognized two "special circumstances" that may "warrant an exception to the normal rules of preclusion"[238]—the *England* exception[239] and the full-and-fair-opportunity exception[240]—but concluded that neither exception was applicable in the *Montana* litigation.[241]

England and *Montana* recognized that in some circumstances a litigant's interest in a federal forum may supersede usual rules of preclusion and permit litigation of issues of fact and law that were not submitted voluntarily to a state court for adjudication.[242] Although both cases involved federal proceedings subsequent to state court judgments, neither considered the application of section 1738 to the preclusion analysis. Thus, they stand as de facto exceptions to the literal reading of section 1738.

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236. Peter Kiewit Sons' Co. v. State Bd. of Equalization, 161 Mont. 140, 505 P.2d 102 (1973). The contractor then sued for a refund of certain other tax payments, and the Montana Supreme Court determined that collateral estoppel and res judicata barred the claim. Peter Kiewit Sons' Co. v. Department of Revenue, 166 Mont. 260, 531 P.2d 1327 (1975).

237. *Montana*, 440 U.S. at 154-55. The concept of "privity" traditionally was employed to describe the identity of interests that justified holding a nonparty to a judgment to the same extent as a party to the action. The Court adopted the functional approach suggested in the RESTATEMENT (SECOND) OF JUDGMENTS draft (now contained in § 39 (1982)) and grounded its holding on the facts that indicated that the United States had effectively prosecuted the state action in the name of the contractor. *Montana*, 440 U.S. at 154-55.

238. *Montana*, 440 U.S. at 155. Justice Marshall considered a third "special circumstance" that is not relevant to this discussion—when the second court is asked to determine "unmixed questions of law" in successive actions involving substantially unrelated claims. *See id.* at 162 (citing United States v. Moser, 266 U.S. 236, 242 (1924)).

239. *Montana*, 440 U.S. at 163.

240. *Id.* at 163 n.11.

241. The adequacy of state procedures was not questioned in the *Montana* litigation. *Id.* at 163-64. The Court considered the *England* exception and determined that the United States, through the contractor, had submitted the federal claim for decision by the state court freely and without reservation. *Id.* at 163. The opinion indicated that had the United States reserved the federal claim and not voluntarily submitted the federal issues to the state court, preclusion would not have been applied. *Id.* at 163 n.10.

242. The possibility of using an *England* reservation of federal issues in a state proceeding as a means of avoiding preclusion consequences has not received substantial support outside of the *Pullman* context. Justice Stewart's opinion in *Allen* distinguished *England* in a manner that appeared to limit its significance solely to *Pullman* cases. *Allen*, 449 U.S. at 101 n.17. Some lower courts have indicated, subsequent to *Allen*, that a state court defendant should be able to reserve federal claims in the same manner as an involuntary state litigant under the *Pullman* abstention doctrine. *See* Southern Jam, Inc. v. Robinson, 675 F.2d 94, 97 n.5 (5th Cir. 1982); *but see* Howell v. State Bar of Texas, 710 F.2d 1075, 1078 (5th Cir. 1983) (*England* reservation device only applies in event of *Pullman* abstention).

D. Summary

This review of state-state and state-federal decisions demonstrates that section 1738 has not been followed strictly when to do so would infringe on certain important state or federal interests. Therefore, the conclusion in *Allen*, *Haring*, and *Migra* that section 1738 governs preclusion issues in section 1983 cases does not mean that state preclusion rules always must be applied. Substantial precedential support exists for the Court's statement in *Haring* that a federal court need not follow state law if to do so would violate the legislative purposes of a federal statute such as section 1983. Whether there is justification for a section 1983 exception to section 1738 is a policy question that should be approached in the same manner that the Court has approached the other exceptions to full faith and credit: would the legislative purpose of section 1983 be thwarted by strict application of section 1738, and can the choice-of-forum purpose of section 1983 be accommodated within full faith and credit principles?

III. 42 U.S.C. § 1983 AND 28 U.S.C. § 1343

The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, included the predecessors to sections 1983 and 1343.[243] It was enacted as part of the Reconstruction Era effort to enforce the rights guaranteed to freed Negroes by the thirteenth and fourteenth amendments.[244] The statute created a federal

243. Act of Apr. 20, 1871, ch. 22, §§ 1-6, 17 Stat. 13-15 (1871). Section 1 of the Act established the cause of action (§ 1983) and federal court jurisdiction to hear such claims (§ 1343):

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

There are several excellent articles that review the history and construction of § 1983. *See* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982); Koury, *Section 1983 and Civil Comity, Two for the Federalism See-Saw*, 25 LOY. L. REV. 659 (1979); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. 2), 60 VA. L. REV. 250 (1974); Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185 (1974); Comment, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 U.C.L.A. L. REV. 177 (1979); Comment, *The Collateral-Estoppel Effect to be Given State-Court Judgments in Federal Section 1983 Damage Suits*, 128 U. PA. L. REV. 1471 (1980); Comment, *Federalism—§ 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. PITT. L. REV. 1035 (1982); Note, *The Preclusive Effect of State Court Judgments on Subsequent 1983 Actions*, 78 COLUM. L. REV. 610 (1978) [hereinafter cited as Note, *The Preclusive Effect*]; Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904 (1976); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

244. U.S. CONST. amend. XIII:

cause of action against persons acting under color of state law who deprived an individual of rights guaranteed by the Constitution and established jurisdiction in the federal district courts to hear claims for damages or injunctive relief for violation of those rights.

Federal courts were not a vehicle for enforcing federal constitutional rights prior to the Reconstruction Era. At their inception in 1789, federal courts had no authority to hear federal question or civil rights cases. They were intended primarily to be neutral tribunals for admiralty claims and for disputes between litigants from different states.[245] When the Bill of Rights was added to the Constitution by amendment, the enumerated rights were protected against infringement by the federal government, but not against actions of state and local governments.[246] Thus, prior to the Civil War no federal cause of action existed against state officials who violated the Constitution. Individual rights were recognized and enforced by the states, not by federal courts, under the original scheme of the Constitution.

The Civil War and the ensuing Reconstruction amendments and legislation effected a dramatic shift in this original allocation of judicial power over individual rights.[247] The thirteenth, fourteenth, and fifteenth amendments guaranteed certain rights vis-à-vis the states and also authorized Congress to enforce those guarantees through appropriate legislation.[248] Congress exer-

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§ 1 *Slavery abolished*

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2 *Enforcement*

Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIV:

§ 1 *Citizenship rights not to be abridged by states*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

§ 5 *Power to enforce article*

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

245. The First Judiciary Act of 1789 established these original bases for federal jurisdiction. Act of Sept. 24, 1789, ch. 20, §§ 1-35, 1 Stat. 73-93 (1789).

246. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833) (fifth amendment due process clause does not govern actions of state or local government in taking private property).

247. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972); Monroe v. Pape, 365 U.S. 167, 174-80 (1961).

248. *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5 (for text of these sections see *supra* note 244). *See also id.* amend. XV, which provides:

Section 1. The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

cised that authority by enacting a series of civil rights statutes[249] which established federal causes of action for violations of constitutional rights.

The purpose of the federal causes of action, such as section 1983, was to permit private enforcement of the thirteenth and fourteenth amendments.[250] The intent of the jurisdictional grant in section 1343 was to make federal courts available for the vindication of federal rights because state courts could not be trusted.[251] The congressional debates at the time of passage of the Civil Rights Act of 1871 recognized that in many states the Ku Klux Klan had a persuasive influence over all branches of government, including the judiciary. State courts were part of the problem addressed in the Act because of their failure to recognize and enforce the rights of Negroes.[252]

The jurisdiction created in section 1343 and the federal question statute enacted in 1875[253] is concurrent with the jurisdiction of state courts over federal constitutional issues. The legislation neither mandated that these federal claims be brought in federal court nor deprived state courts of authority to consider federal issues. The hope and assumption was expressed by members of Congress that some state courts would be receptive to claims of federal rights and therefore state court resolution would continue to be available.[254]

Concurrent jurisdiction in conjunction with the removal statutes passed during the same time period[255] permitted either party to a section 1983 action

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249. Act of March 1, 1875, 18 Stat. 335 (1875); Act of April 20, 1871, 17 Stat. 13 (1871); Act of May 31, 1870, 16 Stat. 140; Act of April 9, 1866, 14 Stat. 27 (1866).

250. *See* Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); Monroe v. Pape, 365 U.S. 167, 180 (1961).

251. CONG. GLOBE, 42d Cong., 1st Sess., 374-76 (1871). *See* Mitchum v. Foster, 407 U.S. 225, 240-42 (1972).

252. *See* Mitchum v. Foster, 407 U.S. 225, 240-42 (1972).

253. Act of March 3, 1875, 18 Stat. 470 (1875). The present version of the federal question statute, 28 U.S.C. § 1331 (1982), provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

254. *See Allen*, 449 U.S. at 100 n.16.

255. The present versions of the removal statutes are 28 U.S.C. §§ 1441, 1443 (1982).

Section 1441 provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removeable [sic] without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Section 1443 provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a

to opt for a federal forum. The plaintiff has the initial choice of filing in state or federal court. If the plaintiff files in state court and the defendant prefers federal consideration, the defendant may remove the action to federal court as a matter of right.[256] If the plaintiff files in federal court, however, the action remains there despite the defendant's possible preference for state court.

Thus, the effect of section 1343 and the removal statutes is not to mandate a federal forum for section 1983 actions, but rather to create the federal court option as an alternative to a state forum. Several Supreme Court decisions have relied upon the choice-of-forum purpose of sections 1343 and 1983 to conclude that the availability of state remedies does not affect the section 1983 litigant's right to elect a federal forum and federal relief.[257]

This choice-of-forum principle also was the basis for the Court's conclusion in *Mitchum v. Foster*[258] that section 1983 constitutes an exception to the Anti-Injunction Statute.[259] This statute prohibits a federal court from granting an injunction to stay proceedings in a state court "except as expressly authorized by Act of Congress" or when necessary in aid of its jurisdiction or to protect its judgments.[260] Although section 1983 does not explicitly authorize federal injunctions against state court proceedings, it does provide for equitable relief against violations of the Constitution. In *Mitchum* the Court reviewed the legislative history of the Civil Rights Act of 1871 and concluded that the Act was intended to protect against constitutional deprivations occasioned by state courts as well as by state legislative and executive actions.[261] The Court concluded that section 1983 was a "uniquely federal remedy"[262] that could be given its intended scope and accomplish its purpose only if it were recognized as an exception to the Anti-Injunction Statute.

> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to

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right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

256. 28 U.S.C. § 1441(a) (1982).

257. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 500-507 (1982) (§ 1983 actions are exceptions to usual requirement that litigant must exhaust state administrative remedies before filing in federal court); Mitchum v. Foster, 407 U.S. 225, 242-43 (1972) (injunctive relief under § 1983 is an exception to the Anti-Injunction Statute, 28 U.S.C. § 2283 (1982)); Monroe v. Pape, 365 U.S. 167, 183 (1961) (§ 1983 is a federal remedy supplemental to state-law remedies; availability of relief under § 1983 is not dependent on the unavailability or inadequacy of state-law remedies).

258. 407 U.S. 225 (1972).

259. 28 U.S.C. § 2283 (1982): "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

260. *Id.*

261. *Mitchum*, 407 U.S. at 240.

262. *Id.* at 239.

> the vindication of those rights; and it believed that these failings extended to the state courts.[263]

Thus, *Mitchum* stands as a strong affirmance of a litigant's right to have a federal court, rather than a state court, determine his federal claim under section 1983.

The *Younger*[264] doctrine, however, with its concern for federal-state comity, has tended to overshadow this choice-of-forum principle when there are pending state proceedings. A section 1983 action in federal court, by its very nature, has a high potential for creating federal-state friction because a federal judge is invited to supplant the decisions and judgment of a state official based on his own interpretation of the Constitution's standards. The Supreme Court in *Younger v. Harris* and subsequent cases has restricted access to federal court to avoid such friction when there is a state proceeding involving important state interests in which the federal plaintiff would have a full and fair opportunity to raise the federal issues.[265]

The inroads made by the comity doctrine into the choice-of-forum principle of section 1983 have been debated extensively by members of the court and commentators.[266] The strongest criticism of the deference to state court adjudication is that Congress passed sections 1983 and 1343 specifically to alter the relationship between state and federal courts; therefore, it is not proper for the Supreme Court to substitute its present view of federal-state comity for that enacted into law by Congress in 1871.[267]

Patsy v. Board of Regents[268] was a watershed case in this debate. It reaffirmed earlier interpretations of section 1983 concluding that no need exists to resort to state administrative procedures before filing a suit in federal court.

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263. *Id.* at 242.

264. Younger v. Harris, 401 U.S. 37 (1971).

265. *See* Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981); Moore v. Sims, 442 U.S. 415 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In *McNary*, for example, plaintiffs who raised due process and equal protection challenges to local real property tax assessments were barred by comity from bringing a § 1983 action in federal court because state administrative and judicial remedies were "plain, adequate and complete." 454 U.S. at 116. Justice Rehnquist's opinion, on behalf of five justices, presented the issue as a direct conflict between precedent establishing a rule of access to federal court in § 1983 actions and the comity principle that bars federal courts from granting injunctive and declaratory relief in a state tax dispute. *Id.* at 105. Justice Rehnquist concluded that access to federal court should yield to the judicial doctrine of restraint because of the importance of taxation to the operation of state and local governments. *Id.* at 116.

266. Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 438 (1982) (Brennan, J., concurring); *Younger*, 401 U.S. at 62 (Douglas, J., dissenting); Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits That "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1971); Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977); Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981); Comment, *Restriction of Access to Federal Courts: The Growing Role of Equity, Comity and Federalism*, 50 TEMP. L.Q. 320 (1977).

267. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 516-17 (O'Connor, J., concurring).

268. 457 U.S. 496 (1982).

The *Patsy* Court relied on the legislative history of section 1983 for its conclusion that the statute should be an exception to the traditional, judicially created doctrine requiring exhaustion of administrative remedies.[269] Seven of the justices in *Patsy* recognized that, even though comity considerations weighed in favor of requiring resort to state administrative remedies, it was Congress' and not the Court's role to establish such a barrier to the section 1983 litigant's access to a federal court.[270]

The *Allen*, *Haring*, and *Migra* decisions did not question the choice-of-forum purpose of section 1983; they held that the unrestricted choice that exists under the concurrent jurisdiction provisions is affected by prior state proceedings. Many instances exist in which applying preclusion would not be inconsistent with section 1983 because the litigants had exercised some choice of forum in the prior proceeding and had been provided an adequate opportunity to raise their federal claim. Thus, a blanket exception to section 1738—an implied repeal for all section 1983 actions—is not necessary to fulfill the legislative purposes of sections 1343 and 1983.

Situations may arise, however, in which strict application of preclusion would thwart section 1983's intent to provide a federal forum as an alternative to state courts. *Allen* and *Haring* appropriately suggest that an accomodation between full faith and credit and section 1983 should be made in those individual cases in which the legislative purpose of section 1983 is implicated.

IV. Exceptions to Application of Full Faith and Credit in Section 1983 Actions

This review of the history and construction of sections 1738 and 1983 indicates that there is ample justification for the two exceptions to the application of state preclusion rules recognized in *Haring*. Thus, when there was not a full and fair opportunity to litigate the claim or issue in the prior proceeding in state court, or when preclusion would contravene the understanding of section 1983 regarding choice of a federal forum, preclusion is not required. Although the full-and-fair-opportunity exception is well established by prior case law, it has been construed narrowly. The greater ambiguity concerns the legislative purpose of section 1983 as a basis for relaxing state rules of preclusion. For this reason, the full-and-fair-opportunity standard will be considered only briefly here, while the justifications for, and the scope of, the understanding-of-section-1983 exception will be discussed more fully.

A. Full-and-Fair-Opportunity Exception

The full-and-fair-opportunity standard has been applied by the Supreme Court in several contexts in which deference to prior judicial proceedings is at

269. *Id.* at 502-07.

270. Justice Marshall's opinion on this point, *id.* at 502-07, was joined in the concurring opinions of Justice O'Connor, *id.* at 516-17 (O'Connor, J., concurring, joined by Rehnquist, J.), and Justice White, *id.* at 517-19 (White, J., concurring). Justice Powell and Chief Justice Burger dissented, *id.* at 519-36 (Powell, J., dissenting, joined by Burger, C.J.).

issue: federal habeas corpus,[271] *Younger* abstention,[272] and federal issue preclusion doctrine.[273] Although it may be subject to varying constructions and applications in these contexts, the full-and-fair-opportunity test was given an exceedingly narrow scope in section 1738 cases by the *Kremer* opinion.[274]

The *Kremer* decision justified this exception as a constitutional restriction on state courts and limited the exception's scope to the most fundamental due process. Such a minimal standard does not require comparable procedures to those available in federal court under section 1983.[275] For example, a state may have an expedited process for eviction actions that does not allow for pretrial discovery and that provides for informal summary hearings. This proceeding presumably does not deny a litigant due process even though a defendant in such an action may be handicapped in his ability to litigate fully federal defenses to his eviction.[276] All rulings in the summary eviction proceeding, therefore, must be given full faith and credit under *Kremer*'s application of the full-and-fair-opportunity standard.

This development of a narrow scope for the full-and-fair-opportunity standard negated earlier indications by the Court that the full-and-fair-opportunity standard might serve as a vehicle for a more searching review of the "quality, extensiveness and fairness" of prior state proceedings before giving them preclusive effect.[277] This narrow application also calls into question the conclusion of Justice Stewart in *Allen* that the full-and-fair-opportunity exception is adequate fo fulfill the legislative purposes of section 1983.[278] It is apparent from Justice White's opinion in *Kremer* and from lower court implementation of the standard[279] that the full-and-fair-opportunity test will

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271. *See* Stone v. Powell, 428 U.S. 465 (1976).

272. Younger v. Harris, 401 U.S. 37 (1971). *See* Moore v. Sims, 442 U.S. 415 (1979) (application of *Younger* abstention doctrine).

273. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313 (1971).

274. Justice White rejected Kremer's assertion that he was not provided a full and fair opportunity to litigate his discrimination claims in the state judicial review proceedings: "[S]tate proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481.

275. *See id.* at 483 ("We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause.").

276. *See* Lindsey v. Normet, 405 U.S. 56 (1972).

277. Montana v. United States, 440 U.S. 147, 164 n.11 (1979). *See* Note, *The Preclusive Effect*, *supra* note 241, at 642-52.

278. Justice Stewart concluded that while he recognized that there was "grave Congressional concern" in 1871 that state courts were not enforcing constitutional rights:

> [I]n the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata.

Allen, 449 U.S. at 99.

279. The following lower court opinions apply the full-and-fair-opportunity standard as a minimum requirement easily satisfied: Roy v. City of Augusta, 712 F.2d 1517 (1st Cir. 1983); Brown v. St. Louis Police Dep't, 691 F.2d 393 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1882 (1983); Davis v. U.S. Steel, 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1256 (1983); Lee v. City of

recognize only the most blatant procedural inadequacies. Standing alone, it does not accomplish the congressional purposes of sections 1983 and 1343.

B. Understanding-of-Section-1983 Exception

Debate concerning the justification for a section 1983 exception to rules of preclusion often is based on one's opinion regarding the adequacy or inadequacy of state courts to protect federally guaranteed individual rights. The majority in *Allen* concluded that the full-and-fair-opportunity test was sufficient to fulfill the intentions of section 1983 because the Court was confident that state courts would competently and sympathetically adjudicate federal constitutional claims.[280]

The dissent in *Allen* argued that Congress "plainly anticipated more than the creation of a federal statutory remedy to be administered indifferently by either a state or a federal court."[281] Sections 1983 and 1343 were designed to provide an option to escape state court adjudication when constitutional rights were jeopardized by actions of state officials. According to the dissent, the choice of a federal forum was created not solely out of concern for procedural regularity, but also because "Congress believed that substantive justice was unobtainable [in the state courts]."[282]

These conflicting attitudes concerning the role of state courts are the basis for debates over other comity-based doctrines, such as *Younger* abstention and federal habeas corpus, in which the procedural adequacy of state consideration of federal issues is the basis for denying a federal forum. Supreme Court opinions during the tenure of Chief Justice Burger frequently have rejected arguments for access to federal court in section 1983 cases. The decisions have been based implicitly on the following logic: The conditions that led to the enactment of the Reconstruction Era civil rights statutes and concurrent jurisdiction have abated; even the more recent racial discrimination problems in the South that led to the expansive interpretations of those civil rights statutes in the 1960s have been corrected; and state courts have demonstrated that they are worthy of the respect and deference that underlies our federalist system; therefore, federal courts should defer or abstain from exercising jurisdiction in many cases that technically fall within their statutory jurisdiction.

Critics of the Court's comity-based rulings have challenged the "myth of parity"[283] between state and federal courts in constitutional adjudication. They perceive the Court's comity doctrine as an effort to divert federal issues into state court systems that are likely to produce less expansive constructions of constitutional rights.[284]

Peoria, 685 F.2d 196 (7th Cir. 1982); Dash v. Alcoholic Beverages Control Appeals Bd., 683 F.2d 1229 (9th Cir. 1982).

280. *Allen*, 449 U.S. at 105.

281. *Id.* at 107 (Blackmun, J., dissenting).

282. *Id.* at 108 (Blackmun, J., dissenting).

283. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

284. *See* Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-79)*, 21 SANTA CLARA L. REV. 891 (1981); Gelfand, *The Burger Court and the New Federalism*, 21

The rationale for an understanding-of-section-1983 exception to rules of preclusion, however, need not be based on a negative evaluation of state court judges as protectors of federal rights in the 1980s. It is the congressional intent in enacting section 1983 and not the Supreme Court's current view of federal-state relations that should govern the reconciliation of full faith and credit and a litigant's interest in choosing a federal forum.

Patsy v. Board of Regents[285] reiterated the primacy of congressional intent in determining issues of access to federal court in section 1983 actions. The majority in *Patsy* recognized that it was debatable as a policy matter whether section 1983 plaintiffs should be required to exhaust state administrative remedies prior to filing in federal court.[286] Seven justices, however, agreed that the 1871 Congress did not intend federal courts to bar parties until after they had pursued state procedures; instead, the majority concluded that policy arguments based on present federal court caseloads and notions of federal-state comity should be addressed to Congress, not to the Supreme Court.[287]

Thus, the ultimate justification for Justice Marshall's additional exception to state rules of preclusion based on the understanding of section 1983 is the congressional intention to provide section 1983 litigants with an opportunity to escape from state court adjudication.[288] Even when a state court proceeding provided a minimum of due process, an involuntary party to that proceeding may have a strong interest in not being precluded from federal court consideration of his federal claim.

B.C.L. REV. 763 (1980); Mahoney, *A Sword as Well as a Shield: The Offensive Use of Collateral Estoppel in Civil Rights Litigation*, 69 IOWA L. REV. 469 (1984); Monaghan, *The Burger Court and "Our Federalism,"* LAW & CONTEMP. PROBS. Summer, 1980, at 39; Morrison, *supra* note 266; Neuborne, *Toward Procedural Parity in Constitutional Litigation: The Role of Concurrent Jurisdiction in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981); Neuborne, *supra* note 266; Note, *Reconciling Federalism and Individual Rights: The Burger Court's Treatment of the Eleventh and Fourteenth Amendments*, 68 VA. L. REV. 865 (1982).

285. 457 U.S. 496 (1982). *Patsy* was decided after *Allen*, but before *Haring*.

286. Justices O'Connor and Rehnquist, concurring, *id.* at 516-17 (O'Connor, J., concurring, joined by Rehnquist, J.) and Justice Powell and Chief Justice Burger, dissenting, *id.* at 532-36 (Powell, J., dissenting, joined by Burger, C.J.), indicated that they support an exhaustion requirement as a matter of policy. Justice Marshall's opinion on behalf of four justices, *id.* at 512, and Justice White's concurrence, *id.* at 518 (White, J., concurring), noted that there are strong arguments both for and against requiring exhaustion.

287. *See supra* note 270.

288. Compelling arguments exist to continue concurrent jurisdiction and provide a choice of forum that do not rest on assumptions of the inferiority of state courts, even without the historical background of the Klan-dominated courts of the Reconstruction Era. Concurrent jurisdiction allows two court systems to grapple with similar problems and develop legal doctrine somewhat independently. This dual development creates increased opportunities for innovation and experimentation and ultimately provides the Supreme Court with more models and approaches to consider before it establishes standards that will be binding on both state and federal systems. *See* Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

In addition, a choice of forum permits a plaintiff to optimize his chance of establishing a constitutional claim. Congress has decided that allowing an aggrieved party the choice of state or federal court systems maximizes the vindication of individual rights against majoritarian action. A strong preference exists to provide civil rights plaintiffs with a federal forum, in the free market that now exists, because these plaintiffs believe that they have a better chance of winning in federal court.

Haring did not explore the scope of a section 1983 exception to the application of state law. The Supreme Court's flexible application of full faith and credit, however, provides a range of possibilities. In some instances, the second forum has been permitted to adjudicate legal and factual issues de novo without any deference to the judgment in the prior proceeding.[289] Another accomodation has been to give prima facie weight to findings in the first action, similar to the treatment of foreign judgments at common law.[290]

The most common balance struck between full faith and credit and conflicting state or federal interests has been to defer to rulings on matters actually litigated and determined by the first court (issue preclusion), but to consider claims not litigated in the state court that otherwise would be barred under claim preclusion. In *Brown v. Felsen*[291] the Supreme Court concluded that it would be inconsistent with the intent of Congress, as expressed in section 17 of the Bankruptcy Act, to preclude consideration by a federal bankruptcy judge of fraud issues that could have been determined, but were not determined, in a state proceeding. The Court indicated that had the fraud issue actually been litigated and determined in state court, the state adjudication might have been dispositive and not subject to relitigation in the bankruptcy action.[292]

The *Migra* Court rejected a construction of section 1738 that would have created a blanket exception to the application of claim preclusion in section 1983 actions. The accommodation of the competing values of sections 1983 and 1738 does not lend itself to a single formula or rule for all cases. A determination whether to permit litigation under this exception should consider all factors relevant to a particular case before deciding whether, and to what extent, the choice-of-forum purpose of section 1983 justifies a relaxation of state rules of preclusion.

V. PROPOSED METHOD OF ANALYSIS

Preclusion issues in state-federal litigation under section 1983 should be

289. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 417 (1964), (*see supra* text accompanying notes 225-34); Kalb v. Feuerstein, 308 U.S. 433 (1940) (*see supra* note 217); D'Arcy v. Ketchum, 52 U.S. 165, 174 (1850) (*see supra* text accompanying notes 157-61).

290. *See, e.g.*, Williams v. North Carolina, 325 U.S. 226 (1945) (*see supra* text accompanying notes 171-82).

291. 442 U.S. 127 (1979) (*see supra* text accompanying notes 220-24).

292. *Id.* at 139 n.10. The plurality opinion in *Thomas* adopted a similar rule for workers' compensation cases and held that a second tribunal need not treat a claim for supplemental benefits as having merged with the prior award, but required adherence to specific findings made by the first tribunal. Thomas v. Washington Gas Light Co., 448 U.S. 261, 280-81 (1980). Issue preclusion is applied to contested determinations of jurisdictional facts made by the initial court in the jurisdiction cases, including divorce. Sherrer v. Sherrer, 334 U.S. 343 (1948). Similarly, in *England* the right to litigate federal issues in federal court was not subject to claim preclusion when a proper reservation of the claim had been made. The litigant will be subject to issue preclusion, however, if he freely submits the federal issues and they actually are determined by the state court. *England*, 375 U.S. at 419. *See* comment of Justice Stevens, Denial of the Petition for Writ of Certiorari in Castorr v. Brundage, 103 S. Ct. 240 (1982), *denying cert. to* 674 F.2d 531 (6th Cir.). Justice Stevens indicated that the application of res judicata to § 1983 actions is not susceptible to a single answer, but will depend on the nature of the prior state proceedings as well as the interests that are at stake in the action.

resolved in a two-step process: first, determine whether the claim or issue would be precluded under the law of the state that rendered the prior judgment; and second, determine whether there is sufficient justification for a different federal rule to supplant state doctrine.[293]

The initial application of state law to the preclusion issue usually will be straightforward. A state statute may establish the preclusion rule.[294] Because claim and issue preclusion are common-law doctrines, however, it is more likely that a federal court will be forced to look to state court decisions for guidance. The task a federal court undertakes when reviewing such precedent is analogous to that under the *Erie* doctrine: the federal court must apply the same "rules of decision" as the courts of the state in which it sits.[295]

The *Haring* opinion demonstrates that the process of "reading the minds of state court judges," which often is problematic in the *Erie* context,[296] may be simpler under section 1738 because general principles of claim and issue preclusion are well established in all states. A federal court, even in the absence of direct state court precedent, can reach reasonably confident conclusions about the application of state preclusion doctrine. Uncertainty is most likely to arise when the common-law doctrine is evolving and there are no recent state court decisions.[297] In such situations, it is appropriate for federal courts to look to trends in other jurisdictions and the federal courts for guidance in predicting the development of state court doctrine.[298]

If a federal court determines that the party's claim would not be precluded under state law, the federal court also should permit the litigation. It is uncertain whether a federal court, consistent with 1738 and due process, ever could apply a "more preclusive" federal rule to bar litigation that would be permitted under state law.[299] In litigation under section 1983, however, it

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293. *Haring*, 103 S. Ct. at 2372-75.

294. *Kremer*, 456 U.S. at 466-67.

295. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); C. WRIGHT, LAW OF FEDERAL COURTS § 55 (1983).

296. C. WRIGHT, *supra* note 295, § 58. *See, e.g.*, Nolan v. Transocean Air Lines, 365 U.S. 293 (1961); Huddleston v. Dwyer, 322 U.S. 232 (1944); Vandenbark v. Owen-Illinois Glass Co., 311 U.S. 538 (1941); Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940); Gustin v. Sun Life Assurance Co. of Canada, 154 F.2d 961 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946).

297. For example, see the Supreme Court's discussion of Ohio claim preclusion doctrine in *Migra*. *Migra*, 104 S. Ct. at 896-99. Ohio case law was evolving from the traditional narrow concept of the same "cause of action" toward the broader "same transaction" standard of the RESTATEMENT (SECOND) OF JUDGMENTS. The Court did not attempt to resolve the close claim preclusion question raised under Ohio law, but remanded for the district court to address that issue in the first instance. *Migra*, 104 S. Ct. at 898-99.

298. *Haring*, 103 S. Ct. at 2373. The same process is followed in *Erie* cases. *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring); C. WRIGHT, *supra* note 295, § 60.

299. Justice White's concurring opinion in *Migra* stated that prior decisions of the Supreme Court had established that the language of § 1738, which requires the "same full faith and credit," bars preclusion by a federal court when state law would not do so. *Migra*, 104 S. Ct. at 899-900 (White, J., concurring). Justice Marshall's discussion of a more preclusive federal rule in the second portion of his opinion in *Haring*, however, implied that the Supreme Court might permit a more preclusive federal rule if there had been more compelling policy justification. *Haring*, 103 S. Ct. at 2375-78. See the discussion of this issue *supra* notes 93-101 and accompanying text. The *Haring* decision is ambiguous on this point in its earlier reference to Union & Planters' Bank of

would be inappropriate to do so because section 1983 was drafted specifically to provide the option of a federal rather than a state forum.[300]

If state law would preclude the claim or issue before the federal court, the applicability of exceptions to full faith and credit then should be considered. The starting point in this analysis should be a strong presumption in favor of applying the state doctrine. This presumption is supported not only by the language and construction of section 1738, but also by conflict of laws principles[301] that usually dictate application of the rendering state's doctrine to promote comity between court systems and finality in the resolution of disputes. It also is appropriate and fair to bind the parties to the initial forum's preclusion doctrine on the presumption that they conducted the litigation on the basis of that jurisdiction's preclusion rules.

A federal court should not preclude, however, when it finds that the party being precluded did not have a full and fair opportunity to litigate the claim or issue, or if consideration by a federal court is warranted by the choice-of-forum purposes of sections 1983 and 1343. Application of the understanding-of-section-1983 exception should be based on consideration of the following five variables that are suggested by the Supreme Court's decisions construing sections 1738 and 1983: the choice of forum; the conflict between state and federal adjudication; the state court consideration of the issue or claim; the burden on the litigants; and the rights being asserted and interests at stake.

A. Choice of Forum

The original congressional purpose of sections 1983 and 1343 was to provide the party asserting a violation of federal rights the option of litigating in federal or state court. How heavily courts should weigh that interest against those interests underlying section 1738 depends on the degree to which the party facing preclusion exercised some choice of forum in the first proceeding.

In some situations the party voluntarily submitted the federal issue to the state court and, therefore, no basis exists for an exception to state preclusion rules. This would be the case when the party being precluded was the plaintiff who initiated the first action and raised the federal issues; or, was the defendant in state court who had the opportunity to remove the action to federal court, but did not; or, was the defendant in the prior proceeding who filed a permissive counterclaim involving the federal issues. The party being pre-

Memphis v. Memphis, 189 U.S. 71 (1903). *Haring*, 103 S. Ct. at 2373 n.6. For discussions of the possibility of a federal court applying a more preclusive rule, see RESTATEMENT, *supra* note 1, § 86 comment g; 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 210, § 4467; Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 326-27 (1978); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 30 (1945); Shapiro, *supra* note 115, at 235-39; Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1736-38 (1968).

300. Justice White supported his decision to allow a more preclusive federal rule by noting that the precluded party would be free to litigate the claim or issue in state court. *Migra*, 104 S. Ct. at 900. This result would be contrary to § 1983's legislative purpose—to provide a federal forum as an alternative to state court.

301. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92, 93, 98 (1971).

cluded in these instances made a decision under jurisdictional and joinder rules that resulted in state litigation of the federal claim or issue.[302] Thus, it is fair to hold him to his choice of forum and the application of its preclusion rules unless he can escape preclusion under the full-and-fair-opportunity test.

A litigant's interest in a federal forum is most compelling in cases in which the party facing preclusion did not litigate the federal issue in state court voluntarily. This setting would include *England*-type cases in which a federal plaintiff is forced to litigate in state court under *Pullman* abstention and also would include cases in which a party faces a claim preclusion defense after he has chosen not to litigate federal claims in the prior state proceeding—for example, if he did not file a federal counterclaim as a defendant in state court or if he filed only state-law claims as a plaintiff.[303]

The voluntariness of the submission of federal claims or issues to the state court often will be a matter of degree, particularly in the case of defenses that involve federal issues that may be raised in response to a suit based on state law. Defenses always are raised voluntarily, but pressures on the defendant often make the voluntariness of his choice of that forum problematic. The defendant in criminal proceedings is "free" not to challenge the constitutionality of the statute under which he is being prosecuted, or not to move to supress evidence seized without a search warrant. The defendant may be able to preserve his right to sue in federal court to have the statute declared unconstitutional or to obtain damages for violation of his fourth amendment rights by not raising such issues. He forfeits the use of that defense to block the state prosecution, however, and his subsequent federal relief does not reverse the

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302. In the first example, a plaintiff who files a federal claim in state court has the choice of filing in either federal or state court. The state defendant who can remove (for example, under 28 U.S.C. § 1441 (1982) when the suit raises a federal question and originally could have been filed in federal court) effectively has the choice of litigating in state or federal court. A decision not to remove is an exercise of choice. Similarly, a defendant who files a permissive counterclaim is under no compulsion to raise it in the state action; he could have filed it separately in federal court.

303. In determining whether a litigant has exercised the choice of forum provided by § 1983 and § 1343, it is tempting to base the conclusion on whether he was the plaintiff or the defendant in the prior proceeding. Justice Blackmun appears to have resorted to such over-simplification when he attempted to reconcile his dissent in *Allen* with his position in *Migra*:

> The rationale of that dissent, however, was based largely on the fact that the § 1983 plaintiff in that case first litigated his constitutional claim in state court in the posture of his being a *defendant* in a criminal proceeding. See 449 U.S. at 115-116. In this case, petitioner was in an offensive posture in her state court proceeding, and could have proceeded first in federal court had she wanted to litigate her federal claim in a federal forum.

Migra, 104 S. Ct. at 898 n.7.

A decision by a plaintiff to raise only state-law claims in state court is *consistent with* the guarantee of § 1983 and § 1343 of a federal forum for federal claims. If a plaintiff files a § 1983 suit in federal court simultaneously with a suit raising state-law claims in state court, it would be inconsistent with the legislative purpose of § 1983 and the Supreme Court's decision in *England*, *see supra* text accompanying notes 225-34, to bar the federal suit because it could have been joined with the state claims in state court. Arguably, Justice Blackmun's lack of sympathy with Dr. Migra's effort to avoid preclusion was because her § 1983 action was not litigated contemporaneously with the state suit, and was viewed as a belated effort to recover more than she had from her victory in state court.

criminal conviction obtained in the absence of that defense.[304]

The degree of voluntariness that can be inferred from a realistic appraisal of different litigation situations should be reflected in the weight given this factor in accommodating the interests underlying section 1738. In cases in which the absence of a choice of forum in the state proceeding is clear, the lack of voluntariness should be a significant point in favor of allowing the section 1983 litigation. The interest in providing a federal forum may be outweighed more easily by concerns for finality and comity that are embodied in section 1738 if there is ambiguity about the voluntariness of the litigation of the federal issues in state court.

The *Allen* Court concluded that in state-federal litigation the interests promoted by section 1738 are comity and the policies underlying the preclusion doctrines—conserving judicial resources, relieving parties of the cost and vexation of multiple lawsuits, and encouraging reliance on adjudication by preventing inconsistent decisions.[305] A court attempting to accommodate section 1738 with the choice-of-forum purpose of section 1983 should consider the effect that the litigation will have on these policies. It is important, however, to distinguish the state's interest in its preclusion rules and the different perspective that a federal court should take in section 1983 state-federal litigation.

In developing its rules of preclusion, a state court system addresses a fundamental tension between the policies identified by the Supreme Court, which favor finality and repose, and concerns for fairness and justice, which may favor reconsideration in light of information that suggests that the correct outcome may not have been reached in the prior proceeding.[306] A state's preclusion doctrine, with its general rules and exceptions, is an effort to strike a balance on the basis of the state court's perception of the interests at stake. A section 1983 exception to state rules of preclusion recognizes that different interests are at stake in a section 1983 action in federal court, and a different accommodation from that made by state doctrine may be appropriate.

Some of the policies that might motivate a state in establishing its preclusion rules and exceptions may be of little or no concern to a federal court. A state's interest in conserving its judicial resources is a significant factor in enumerating the parameters of its preclusion doctrine. Claim and issue preclusion compel the litigation of related claims in a single proceeding, give fi-

304. *Compare* Allen v. McCurry, 449 U.S. 90 (1980) (federal plaintiff had raised a fourth amendment issue in a motion to suppress evidence in the state criminal prosecution) *with* Haring v. Prosise, 103 S. Ct. 2368 (1983) (federal plaintiff had not raised a fourth amendment objection to certain evidence and pleaded guilty). See also Wooley v. Maynard, 430 U.S. 705 (1977), in which a Jehovah's Witness was permitted to challenge the constitutionality of a New Hampshire criminal statute in federal court even though the federal issue could have been raised, but was not, as a defense in his state court prosecution. The federal action was allowed, in part, because the relief requested, a declaration of the unconstitutionality of the statute, would not overturn defendant's conviction or collaterally attack the state court judgment. *Id.* at 711. It is unlikely that any of these parties based their decisions to raise or not to raise a constitutional claim in the state proceeding on the availability of a subsequent § 1983 claim.

305. *Allen*, 449 U.S. at 94.

306. RESTATEMENT, *supra* note 1, Introduction at 11-13.

nality to rulings made in the course of the proceeding, and promote efficiency. An exception to preclusion that permits the litigation of matters previously adjudicated or matters that could have been joined in a prior action is a determination that some countervailing policy justifies the additional expenditure of judicial effort. No reason exists in state-federal litigation to defer to a *state's* determination of how it wants to allocate its judical resources, since it is the federal system that will be spending its time and money on the section 1983 litigation.

The distinction between the federal and state courts' perspectives in setting their own rules is particularly significant in analyzing claim preclusion defenses. The arguments for deference to state preclusion rules are diminished greatly when the issue or claim in question never has been considered by a state court.

B. Conflict Between State and Federal Adjudication

The central purpose of the full faith and credit statute was to require conformity with state court judgments, both out of respect for the sovereignty of other state court systems and to avoid the friction that could result from conflicting judgments. If permitting federal litigation would undermine a state court judgment, this factor would weigh heavily in favor of preclusion. On the other hand, if the federal action would not relitigate issues or claims already determined by the state court and, therefore, would not result in inconsistent rulings, this concern for deference to state proceedings would yield more easily to countervailing federal-forum interests.[307]

The focus on the potential for conflicting judgments explains the differing treatment afforded issue preclusion and claim preclusion in section 1738 decisions. When the second proceeding considered claims or issues that had not actually been litigated in the prior state proceeding, such as the supplemental workers' compensation claim in *Thomas*[308] and the bankruptcy action in *Brown*,[309] the interests of the second forum were considered sufficiently important to outweigh application of the merger aspect of claim preclusion. The Supreme Court, in both *Thomas* and *Brown*, relied on the lack of serious conflict between the second proceeding and determinations by the prior state tri-

307. *See* Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 87-96 (1982). Professor Atwood's article, written after the *Allen* and *Kremer* decisions but before *Haring* and *Migra*, recognized the inapplicability of the full faith and credit clause in situations in which permitting the federal litigation will "not contradict actual determinations of the state court or disturb the finality of the judgment." *Id.* at 109. She further concluded that exclusive jurisdiction statutes should be treated as implied repeals of § 1738 and that claim preclusion should be inapplicable when such jurisdiction is invoked after a state proceeding. She also stated, however, that claim preclusion should be applicable in § 1983 actions because they are within the concurrent jurisdiction of the federal and state courts.

Her position, similar to *Migra*, is not inconsistent with this Article to the extent that it concludes that § 1983 is not a blanket exception to § 1738. For the reasons presented in this Article, however, sufficient flexibility remains in the application of § 1738 to allow for individual exceptions to preclusion based on the understanding of § 1983.

308. *Thomas*, 448 U.S. 261 (*see supra* text accompanying notes 191-206).

309. *Brown*, 442 U.S. 127 (*see supra* text accompanying notes 220-24).

bunal.[310] The Court, however, has indicated in both the workers' compensation and bankruptcy contexts that issue preclusion may be applied when the federal proceeding creates the risk of results that are in direct conflict with state court determinations.[311]

The weight placed on this desire to avoid inconsistent rulings will vary according to the nature of the conflict created. The risk of inconsistent rulings is of greatest concern when the federal action is a collateral attack on the state judgment itself; it is of significantly less concern when the federal claim was not litigated or decided. Somewhere between these extremes are cases in which litigation of a federal claim not already adjudicated by the state court would involve reconsideration of a subsidiary finding by the state court. The possibility of conflicting findings of fact often will not be as significant a concern as conflicting judgments. The Court permitted the federal plaintiff in *England* to relitigate issues of fact subsidiary to the federal claim even though the state court had made findings on those same issues.[312] Under the *England* holding, however, the federal court may not permit a collateral attack on a state court judgment in which the state court actually adjudicates the federal claim itself.[313]

C. State Court Consideration of the Issue or Claim

The nature of the state court's consideration of the claim or issue is critical to the interests underlying both section 1983 and section 1738. The legislative purpose of section 1343's establishment of federal jurisdiction for section 1983 claims was to permit escape from potentially biased or unsympathetic state judicial systems. This purpose supports reconsideration by a federal court if the state proceeding was limited in its scope and procedures, or if the federal issue was relatively insignificant. If the federal issues were the main focus of plenary state proceedings and were considered sympathetically and completely, however, this concern is of less significance.

The potential for friction and the affront to state sovereignty that accompanies a decision not to follow a state ruling also vary in relation to the quality and extensiveness of state court consideration of the claim or issue. If the claim or issue was tangential to the state proceeding and was determined without explanation or analysis, the ruling may not merit the same deference as one that was central to the state proceeding and that was the subject of extensive discovery, argument, and discussion.[314]

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310. *Thomas*, 448 U.S. at 280-81; *Brown*, 442 U.S. at 133.

311. *Thomas*, 448 U.S. at 280-81; *Brown*, 442 U.S. at 138 n.10.

312. *England*, 375 U.S. at 417.

313. *Id.* at 418.

314. In an opinion respecting the denial of a petition for a writ of certiorari in Castorr v. Brundage, 103 S. Ct. 240 (1982), *denying cert. to* 674 F.2d 531 (6th Cir.), Justice Stevens argued that the "character of the earlier state proceedings," as well as the "character of the federal constitutional claim" affect the applicability of claim preclusion of a § 1983 action. Justice Stevens concluded that "[d]ifferences in procedures and in standard of review in prior state proceedings in different cases may affect the degree to which federal courts should apply res judicata." *Castorr*, 103 S. Ct. at 241 & n.2. Justice Stevens' *Castorr* position mirrored the position taken by Justices

The full-and-fair-opportunity exception to preclusion inadequately addresses this problem because of its minimal requirements and its all-or-nothing consequences.[315] Full preclusive effect is accorded as long as the state proceeding provided minimal due process. It is more realistic to recognize that, although a state proceeding may provide minimally adequate due process, it may not provide comparable consideration of all issues subsidiary to its judgment.[316]

Therefore, as to this factor, the interests underlying sections 1983 and 1738 are consonant. When the state court consideration of the federal issue is less extensive or tangential, the interest of the litigant in an independent federal determination is greater and the deference merited by the state ruling is less significant. Conversely, when the state court consideration of the federal issue is plenary and well focused, the party's interest in a federal forum is diminished and the state determination is entitled to greater deference.

D. Burden on Other Litigants

Permitting further litigation may cause additional cost and vexation for the defending party who otherwise would be protected by state rules of preclusion. Relitigating the matters actually contested and decided in state court would be direct duplication and difficult to justify. On the other hand, allowing a separate suit in federal court on claims not considered by the state court might not create a substantial burden on the defendant. As long as issue preclusion is applied to specific findings made by the state court, no need exists to duplicate the evidence presented there. In many situations the federal proceeding will consist primarily of putting a federal gloss on the state court's fact findings with some supplementation of evidence.

This consideration weighs more heavily against an exception to preclusion of matters already decided by a state court. Permitting the litigation of matters not adjudicated previously does not add significantly to the defending party's litigation burden and is more easily justified by the choice-of-forum policy articulated by Congress in section 1983.

E. Nature of Rights Being Asserted and Interests at Stake

The preclusion doctrines, as much as any procedural area, are influenced

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Blackmun, Marshall, and Brennan in the dissenting opinion of Justice Blackmun in *Kremer*. *Kremer*, 456 U.S. at 486-508 (Blackmun, J., dissenting).

315. *See supra* text accompanying notes 275-79.

316. RESTATEMENT, *supra* note 1, Introductory Note to ch. 6 at 265. The Supreme Court employed an analysis similar to that suggested in this Article in *McDonald v. City of West Branch*, 104 S. Ct. 1799, 1803-04 (1984). A unanimous Court concluded that an arbitration award should not be given claim- and issue-preclusion consequences in a § 1983 action, in part because an arbitration proceeding does not provide fact-finding comparable to that of a judicial proceeding. Although acknowledging that arbitration proceedings may provide adequate due process to the parties, the Court determined that such proceedings are not an adequate substitute for a federal trial because the record in arbitration proceedings is not as complete, the usual rules of evidence do not apply, and procedures such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable. *Id.* at 1804.

by the substance of the issues and claims being litigated.[317] This influence is particularly appropriate to recognize and legitimize in analyzing preclusion issues in section 1983 actions because the legislative purpose of section 1343 and the removal statutes was to provide an escape from state court adjudication because of the substance of the claim asserted—relief from unconstitutional state laws and conduct of state officials.

This consideration raises little question about the preclusive consequences of those findings in which a prior state proceeding adjudicated purely factual matters within the scope of state court jurisdiction. If the state court determination involved application of federal substantive law to those facts, however, there is a federal interest in having that determination comport with federal policies. Additionally, the federal policies at stake in the state proceeding, such as prohibitions against racial discrimination or suppression of free speech, weigh in favor of providing a federal forum despite state rules of claim preclusion if a federal claim based on those facts never actually was litigated in state court.

It is widely recognized that the substantive federal claim affects application of preclusion rules in state-federal litigation.[318] It is more difficult, however, to move from that generalization to a more particularized statement regarding how to weigh the nature of the claim in the balancing of interests in favor of and against preclusion.[319] The most that can be said is that, consistent with the legislative purpose of section 1983, federal courts have played a special role in enforcing certain substantive norms, particularly ones protecting individual liberties against majoritarian state legislative and executive action. Freedom of speech, equal protection, and due process guarantees against state infringement traditionally have been vindicated more frequently in federal courts than in state courts, presumably because the countervailing interests of the state have been given greater deference by state courts than by federal courts.[320]

317. *Id.* at 266 ("What can be stated generally is that such substantive concerns have a legitimate place in determining whether the rules of claim and issue preclusion should be given their ordinary effect in a multi-forum context.").

318. Castorr v. Brundage, 103 S. Ct. 240 (1982) ("character of the federal constitutional claim" affects applicability of claim preclusion in § 1983 action), *denying cert. to* 674 F.2d 531 (6th Cir.); RESTATEMENT, *supra* note 1, § 86 comment b.

319. THE RESTATEMENT (SECOND) OF JUDGMENTS concluded that "the fact that federal substantive interests are at stake is a factor militating in some degree, against treating the state court judgment as conclusive." RESTATEMENT, *supra* note 1, § 86 comment b, at 305. The RESTATEMENT did not formulate any specific standard for deciding *when* federal interests were sufficient to justify an exception to preclusion on this basis, however, because "given the variousness of federal policies, it is impossible to frame generalizations as to the weight that a state adjudication should have in the face of an arguably overriding federal concern." *Id.* at 305-06.

320. *Id.* at 305-06. *See, e.g.*, Ferguson v. Winn Parish Police Jury, 589 F.2d 173, 176 n.6 (5th Cir. 1979) ("Principles of res judicata are not strictly applied in voting rights cases because their application would unfairly deny the members of a large class fundamental constitutional rights merely because counsel representing the named plaintiffs in the case made a legal error."); Local 1006, A.F.S.C.M.E. v. Wurf, 558 F. Supp. 230 (N.D. Ill. 1982) (court did not explicitly address importance of rights, but attached significance to issues at stake—first amendment and racial discrimination claims). See also cases cited in Comment, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 U.C.L.A. L. REV. 177, 211-212 (1979).

This consideration, in conjunction with the nature of the state court consideration of the issue, recognizes that the question of the deference given to a state court ruling should have both procedural and substantive considerations. The weight accorded a state judgment should depend on an analysis of the "quality and intensiveness of the opportunity to litigate"[321] in the state and federal actions as well as the particular substantive policy that the federal court is asked to vindicate in the second proceeding.

The nature of the interests at stake may not always weigh in favor of permitting the federal litigation. The state's interests that are involved in a section 1983 action may be matters of particular importance to the functioning of state or local government. If so, the comity concerns that are the basis for *Younger* abstention and that underlie section 1738 may favor deference to the prior state court judgment. The nature of the claim also may weigh in favor of preclusion because of the consequences that further litigation would have on either the litigants or on third parties. Arguments for a section 1983 exception to rules of preclusion in child custody cases have not been embraced because "prolongation of [such] litigation might have a serious adverse effect on the emotional and physical health of the child."[322]

VI. Application of Proposed Analysis

Issue preclusion and claim preclusion fare quite differently in the application of this Article's proposed analysis to common state-federal litigation situations. Potential exists for directly conflicting judgments and the defending party is faced with the expense of redundant litigation when an issue in the federal proceeding was actually litigated and determined in the prior action. The focus of issue preclusion analysis, therefore, is whether the factors of choice of forum, nature of the state court consideration, and the interests at stake are sufficiently compelling to permit relitigation. Conversely, under this analytic framework, when an issue or claim has not been adjudicated by a state court but would be subject to claim preclusion, the concerns regarding inconsistent rulings and the burden on the defendant are diminished and it is more likely that the interest in a choice of forum will control. This conclusion, however, does not translate into a simple rule that issue preclusion will apply in section 1983 actions, but that claim preclusion will not.

Assume that a tenant, whose lease with a public housing authority was not renewed, believes that the housing authority took that action in retaliation for her tenant-organizing activities. She may be able to challenge that action under state law as a breach of her lease or a violation of state statutes, and also under the Constitution as an infringement of her right to freedom of speech. These claims could be the basis for an affirmative suit in state or federal court and also could be defenses to an eviction action by the housing authority. Assuming that tenant brings a section 1983 claim in federal court subsequent

321. RESTATEMENT, *supra* note 1, Introductory Note to ch. 6 at 265.

322. Castorr v. Brundage, 103 S. Ct. 240 (1982), *denying cert. to* 674 F.2d 531 (6th Cir.).

to a state proceeding, what preclusive effect should the state court consideration have on the federal suit? A literal reading of section 1738 mandates that the preclusion consequences should be the same as the state court would accord the previous judgment. The analysis developed in this Article, however, suggests that no single answer can be given to that question; whether to defer to the state rules depends on "the character of the earlier state proceeding"[323]—who chose the state forum and what was the context and the extent of consideration of the federal issues in that proceeding. To test this proposal, consider its application in two typical situations: federal section 1983 litigation after tenant was a defendant in a state eviction proceeding and after tenant was a plaintiff in an affirmative suit in state court.

Assuming that tenant was the defendant in a prior eviction proceeding in which she successfully raised the retaliation defense based on her lease and state statutes, may she subsequently sue for damages in federal court on her first amendment claim? Tenant would be precluded under state preclusion doctrine in most jurisdictions if the damage claim is considered a compulsory counterclaim.

Tenant would have a strong argument under the analysis proposed in this Article that she could avoid preclusion on the basis of the understanding-of-section-1983 exception. The variables of choice of forum, lack of conflict between state and federal rulings, nature of the state court consideration, and the right being asserted all support allowance of federal litigation. Tenant had no control over the initial forum and, as an involuntary litigant, did not submit the federal issues to the state court as either a defense or a counterclaim. Because the prior court did not address the federal claim, there is no risk that the federal proceeding would result in a conflicting judgment; a decision to award, or not award, damages would not undermine the state court determination not to evict her. The constitutional free speech nature of the claim also supports providing tenant with a federal forum. The only factor that might weigh in favor of preclusion is the burden on the housing authority to litigate the damage claim in a separate proceeding. This inconvenience and expense would be minimal, particularly if issue preclusion were applied to avoid relitigation of factual findings by the state court. Thus, permitting tenant to litigate her federal claim in a second action would promote the choice-of-forum interest behind section 1983 and would not intrude seriously on the interests underlying section 1738.

A closer question arises if tenant actually had litigated the free speech issue as a defense and the state court had found that the first amendment had not been violated and ordered her eviction. Issue preclusion doctrine normally would bar any relitigation of the federal issues in a subsequent section 1983 action. An exception to preclusion based on section 1983 would be unlikely because the factors are balanced more evenly and weigh less strongly in

323. *Id.* at 241.

favor of permitting relitigation. An exception to preclusion could be justified only if the state court consideration of the federal claim was extremely limited.

Whether tenant exercised a choice of forum by raising her free speech defense is ambiguous—she was not a voluntary litigant in the eviction, and although she did raise the issue on her own, it is realistic to recognize that it was raised under the pressure of probable eviction without the defense. Thus, although she has an interest in obtaining a federal forum for her first amendment claim, that factor does not weigh as heavily in her favor as it would had had she refrained from raising the defense in the eviction proceeding.

Allowing a second suit would create a risk of inconsistent rulings because a damage award only could be premised on a finding that the nonrenewal of tenant's lease violated her first amendment rights—a direct contradiction of the state court holding. On the other hand, a federal ruling would not be a collateral attack on the eviction judgment itself, as long as the federal court is not asked to keep tenant in her apartment. It would burden the housing authority, and be much more of a duplication of litigation than if claim preclusion were involved, if tenant was permitted to relitigate issues from the eviction.

The factor that supports an exception to preclusion is the nature of the claim. The substantive federal interest in protecting free speech would be promoted by a federal court assessment of the conduct of the housing authority against the standards of the first amendment. This substantive interest would not be sufficient to justify relitigation, however, unless there were reasons to question the fairness and completeness of the state consideration of the federal issue. For example, if tenant were handicapped severely in her ability to develop and present the free speech defense, as in a case in which the eviction proceeding did not permit discovery and provided an expedited summary hearing, a federal court should allow the litigation of the federal claim under the federal rules of procedure.

Another approach to preclusion arises if the prior state proceeding was not an eviction action brought by the housing authority but was an affirmative suit by tenant for injunctive relief or damages, or both, as soon as she was notified that her lease would not be renewed. Tenant could join her federal and state law claims in a single suit in either state or federal court. If she chose instead to split her claim and bring separate actions based on state law in state court and on the section 1983 claim in federal court, and the state court was the first to enter a judgment, claim preclusion normally would bar the federal court from considering the section 1983 claim because it could have been joined with the state claim in state court. This preclusion would apply regardless of whether the state court ruling was favorable to tenant.

A review of the factors suggested in this Article indicates that, in this setting, tenant should be permitted to litigate the section 1983 claim in federal court, but that she could be bound as a matter of issue preclusion to the factual and legal findings made by the state court. Although she was a voluntary litigant in state court, she exercised the choice of a federal forum established

by section 1343 by filing her section 1983 claim in federal court. Her interest in having a federal forum consider that claim is comparable to that of the plaintiffs in *England*, whose filing in federal court and decision not to litigate their federal claim in state court protected them from normal preclusion doctrine.

The key question in this analysis is whether tenant's decision to file the state claim in state court, rather than as a pendent claim in federal court, diminishes her interest in having a federal court adjudicate the federal issues. It should affect the issue preclusion analysis because she voluntarily submitted the factual and legal issues underlying her state-law claim to the state court. Thus, no choice-of-forum basis exists to justify relitigation of the state court findings. Splitting her federal and state claims, however, is entirely consistent with her interest in choosing a federal forum; permitting the application of claim preclusion in such a case would defeat the legislative purpose of section 1983. Therefore, tenant has a strong argument for determination of her federal claim by the federal court on the basis of the choice-of-forum principle.

The analysis of the remaining variables would be quite similar to the cases in which tenant did not litigate the federal issues in the state proceeding. As long as issue preclusion is applied, an exception to claim preclusion to allow litigation of the section 1983 claim would not create a risk of inconsistent judgments, significantly burden the housing authority, or be inconsistent with the substantive federal interest in protecting free speech.

A different result occurs if tenant had submitted the federal issue to a state court for determination. She would have no apparent basis for escaping preclusion if she included the federal issue in an affirmative suit in state court or if she raised it as a permissive counterclaim in an eviction proceeding. The choice-of-forum interest would not weigh in her favor because in both instances she exercised control over the forum in the prior proceeding. The interest in avoiding inconsistent judgments would be jeopardized if issue preclusion were not applied to the state court's determination of the federal issue.

These examples of voluntary submission of the federal issue to a state court are stronger cases for preclusion than when tenant raised the federal issue as a defense to the eviction. In the latter, she was involuntarily a party to the state proceeding and raised the federal issue under the duress of probable eviction without that defense. If tenant included the federal claim in an affirmative suit in state court, however, she would be choosing the state forum and litigating the federal issue under no compulsion. In a permissive counterclaim situation, she would be in state court involuntarily as a defendant but under no duress to file the federal claim in that tribunal because, as a counterclaim, it would not be waived or precluded if not joined in the state proceeding.

The analysis proposed in this Article does not provide clear answers to preclusion questions in all settings. The premise of this approach is that in this area simplicity of rules will be at the expense of justice. The legislative pur-

pose of section 1983 can be achieved with minimal intrusion into full faith and credit principles if cases raising preclusion issues are analyzed in the manner suggested. Consideration of the variables identified would clarify and inform the discretionary decision of a federal court whether the understanding of section 1983 justifies an exception to state rules of preclusion.

VII. CONCLUSION

The Supreme Court's decisions in *Allen*, *Haring*, and *Migra* have shifted the focus of preclusion analysis in section 1983 cases from federal common-law principles to the full faith and credit statute. Despite the literal reading of that statute adopted in some decisions, section 1738 does not necessarily mandate that state doctrine be dispositive of preclusion questions. The Supreme Court historically has applied section 1738 with flexibility so that state rules of preclusion have been ignored or modified when full faith and credit conflicts with other important state and federal interests. An exception to state rules of preclusion may be justified in light of the choice-of-forum purpose of sections 1983 and 1343 depending upon the particular circumstances of the prior proceeding. The applicability and scope of such an exception should be determined on a case-by-case basis taking into consideration the degree to which the party being precluded exercised choice over the state court forum, the extent to which the federal action could lead to inconsistent judgments in the state and federal proceedings, the nature of the state court consideration of the federal issue, the burden on the defending party, and the nature of the federal right being asserted.