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Res Judicata in Federal Civil Rights Actions Following State Litigation

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Frequently, a federal civil rights action challenging state laws or a state official's conduct follows or is even concurrent with related litigation in state courts. Despite the increasing frequency of this pattern,¹ the effect, as res judicata, to be given the state litigation remains unsettled. This uncertainty is reflected in the inconsistent approaches found not only between the circuits but as well within a single circuit. Such a state of affairs, especially as it touches so intimately the problem of federal-state relations to which the Supreme Court has of late appeared so sensitive, calls for resolution.

A special tension arises, of course, between an increasingly voracious res judicata,² and a sense that federal civil rights actions present demands so special as to overshadow the policies³ enforced by res judicata principles.⁴

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¹The increase in federal civil rights actions is well known and is reported in any number of sources. See, e.g., H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 51 *et seq.* (2d ed. 1973). Insofar as a constant proportion of these cases involves prior state litigation, it is assumed that an increase in the pattern of cases discussed has occurred.

²Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357 (1974). The author notes a modern procedural trend toward larger units of litigation of which the broadening reach of res judicata is but a part. The most obvious expansion occurs in the enlargement of the concept of "same cause of action" and in the decline of mutuality. The author goes so far as to suggest the estoppel of even nonparties to the first action under certain circumstances.

³These policies, expressed as well in Cleary, *Res Judicata Re-examined*, 57 YALE L.J. 339 (1948), as anywhere else, are said to include: prevention of a danger of double recovery; promotion of stable decisions; protections against repeated vexatious litigation; and promotion of court economy. See also 1B MOORE'S FEDERAL PRACTICE ¶ 0.405 (2d ed. 1974).

⁴For the most part I will use the terminology favored by the American

In the pages that follow I will portray the confusion that exists in the federal courts, describe the several patterns in which the problem is most apt to surface, and then examine various approaches to solution of the problem.

I. THE PRESENT STATE OF AFFAIRS

A. *Confusion Below/Silence Above*

In the course of foreclosing access to a federal court, at least until related state proceedings were completed, Justice Rehnquist, in *Huffman v. Pursue, Ltd.*,⁵ admitted that at the moment of completion of the state proceedings, "normal rules of res judicata and judicial estoppel [might well] operate to bar relitigation in actions arising under 42 U.S.C. § 1983 of the federal issues arising in state court proceedings."⁶ If such is the case, the initial rebuff in fact locks the federal court door for all time. However,

Law Institute in the *Restatement of the Law of Judgments*. "Res judicata" refers to a bundle of doctrines: "bar," "merger," "direct estoppel," and "collateral estoppel."

If a valid and final personal judgment for money is rendered in favor of the plaintiff, the cause of action is merged in the judgment, and he cannot thereafter maintain an action (see § 47). If a valid and final personal judgment is rendered in favor of the defendant on the merits, the original cause of action is barred by the judgment (see § 48). . . . Where, therefore, the second action is based upon the same cause of action as that upon which the first action was based, the judgment is conclusive as to all matters which were litigated or might have been litigated in the first action.

Where, however, the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case only as to matters actually litigated and determined by the judgment. The judgment is not conclusive as to matters which might have been but were not litigated and determined in the prior action. (See § 68).

A judgment, therefore, has not only a direct effect upon the cause of action in which the judgment is rendered was based, by way of merger or bar, but also has a collateral effect upon other causes of action involving the same parties, by way of . . . "collateral estoppel."

RESTATEMENT OF JUDGMENTS, Introductory Note, at 158-59 (1942). Thus bar, merger, and direct estoppel apply where the subsequent case is the same as the first, while collateral estoppel concerns different claims with some common issues.

Use here is also made of Professor Vestal's nomenclature. "Claim preclusion" is essentially synonymous with bar and merger and "issue preclusion" with collateral estoppel. See Vestal, *supra* note 2.

⁵420 U.S. 592 (1975).

⁶*Id.* at 606 n.18.

since res judicata had not been raised specifically,⁷ the Court was not required to advance beyond the following speculation of Justice Powell, dissenting in *Ellis v. Dyson*:⁸

The Court has never expressly decided whether and in what circumstances § 1983 can be invoked to attack collaterally state criminal convictions. The resolution of this general problem depends on the extent to which, in a § 1983 action, principles of res judicata bar relitigation in federal court of constitutional issues decided in state judicial proceedings to which the federal plaintiff was a party.⁹

This same postponement can be found in *Preiser v. Rodriguez*,¹⁰ in which Justice Brennan observed:

[W]e have never held that the doctrine of res judicata applies, in whole or in part, to bar the relitigation under § 1983 of questions that might have been raised, but were not, or that were raised and considered in state court proceedings. The Court correctly notes that a number of lower courts have assumed that the doctrine of res judicata is fully applicable to cases brought under § 1983. But in view of the purposes underlying enactment of the Act—in particular, the Congressional misgivings about the ability and inclination of state courts to enforce federally protected rights, . . .—that conclusion may well be in error.¹¹

In the face of such a lack of guidance, the lower federal courts have indeed gone in many directions. A clear majority, however, have assumed that civil rights actions provide no special exceptions to the triumphant principles of res judicata. For example, the Second Circuit barred a federal challenge to a state law limiting hours of outside work for policemen following an unsuccessful attack in state court with the stern comment that “[t]he Civil Rights Act, unlike federal habeas corpus, does not

⁷*Id.* at 607-08 n.19.

⁸421 U.S. 426, 437 (1975) (Powell, J., dissenting). Here, too, the question was avoided.

⁹*Id.* at 440.

¹⁰411 U.S. 475 (1973). See also *Wilwording v. Swenson*, 404 U.S. 249 (1971) (Burger, C.J., dissenting); *Perez v. Ledesma*, 401 U.S. 82, 124 (1971). The inconsistency in the lower federal courts is described in the text following, and has already been noted by other commentators. See, e.g., Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723 (1968).

¹¹411 U.S. at 509 n.14 (Brennan, J., dissenting).

permit a second bite at the cherry."¹² A variety of courts have been as explicit in rejecting the contention that civil rights statutes provide some sort of exception to res judicata principles;¹³ and the greater number apparently have assumed that res judicata is inexorable.¹⁴

A few courts, notably in the Fifth Circuit, achieve the same results by treating the federal suit as a quest for appellate review, and, as such, beyond the jurisdiction of the district court. For example, where a school teacher's discharge was unsuccessfully challenged in the Louisiana state courts, the teacher's resort to the federal district court claiming racial discrimination was treated as an invitation to review the work of the state courts.¹⁵ The dismissal for lack of jurisdiction was pinioned on *Rooker v. Fidelity Trust Co.*,¹⁶ a case in which the Supreme Court repulsed a bill seeking to have an Indiana judgment declared void as contravening various constitutional safeguards. Justice Van Devanter characterized the bill as a prayer for appellate review—a jurisdiction, of course, not vouchsafed to the district courts. Other recent cases have also bowed to *Rooker*,¹⁷ but as Judge Rives has noted, such an approach is probably, in light of *Bell v. Hood*,¹⁸ an

¹²*Lackawanna Police Benevolent Ass'n v. Balen*, 446 F.2d 52, 53 (2d Cir. 1971).

¹³*See, e.g.,* *Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) (Douglas, J., dissenting); *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972); *Goss v. Illinois*, 312 F.2d 257 (7th Cir. 1963); *Palma v. Powers*, 295 F. Supp. 924 (N.D. Ill. 1969).

¹⁴*See, e.g.,* *Rios v. Cessna Fin. Corp.*, 488 F.2d 25 (10th Cir. 1973); *Hutcherson v. Lehtin*, 485 F.2d 567 (9th Cir. 1973); *Fisher v. Civil Serv. Comm'n*, 484 F.2d 1099 (10th Cir. 1973); *Hanley v. Four Corners Vacation Properties, Inc.*, 480 F.2d 536 (10th Cir. 1973); *Metros v. United States Dist. Court*, 441 F.2d 313 (10th Cir. 1970); *Coogan v. Cincinnati Bar Ass'n*, 431 F.2d 1209 (6th Cir. 1970); *Howe v. Brouse*, 422 F.2d 347 (8th Cir. 1970); *Rankin v. Florida*, 418 F.2d 482 (5th Cir. 1969); *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967); *Jenson v. Olson*, 353 F.2d 825 (8th Cir. 1965); *Hamilton v. Ford*, 362 F. Supp. 739 (E.D. Ky. 1973); *Wilke & Holzheiser, Inc. v. Reimel*, 266 F. Supp. 168 (N.D. Cal. 1967); *Connelly v. Balkwill*, 174 F. Supp. 49 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (1960).

¹⁵*Frazier v. East Baton Rouge Parish School Bd.*, 363 F.2d 861 (5th Cir. 1966).

¹⁶263 U.S. 413 (1923).

¹⁷*See, e.g.,* *Jack's Fruit Co. v. Growers Marketing Serv., Inc.*, 488 F.2d 493 (5th Cir. 1973); *Tang v. Appellate Div.*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); *Community Action Group v. City of Columbus*, 473 F.2d 966 (5th Cir. 1973); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969). *See also* *O'Connor v. O'Connor*, 315 F.2d 420 (5th Cir. 1963); *Kay v. Florida Bar*, 323 F. Supp. 1149 (S.D. Fla. 1971).

¹⁸327 U.S. 678 (1946).

anachronism.¹⁹ It is probably true that the effect of res judicata should be the dispositive factor. Nevertheless, whether the federal suit fails because of res judicata or because it is characterized as a quest for a review not available, the result is the same—loss of access to a federal forum for the purposes of factfinding.

While a distinct minority, some courts have softened the impact of res judicata, either by discerning policies of equal moment competing with, or by regarding section 1983 and similar provisions as exceptions to, normal principles of res judicata. *Ney v. California*²⁰ is among the more notable cases according section 1983 exceptional status. While there was some doubt as to whether issues raised in Ney's section 1983 action had been determined in his prior state criminal conviction, the Ninth Circuit suggested that, even so, the Civil Rights Act would become a dead letter if parties were estopped by earlier state litigation.²¹ Similarly, the Second Circuit, in *Lombard v. Board of Education*,²² refused to apply res judicata to bar a litigant's section 1983 claim following two previous state proceedings in which plaintiff, a public school teacher, challenged his discharge but failed to raise certain federal constitutional issues now central to his quest for relief. The court worried that to apply res judicata undiluted, especially where the plaintiff's failure to raise the federal issue in the state court precluded federal court review of the state court decision and where, had the plaintiff originated his litigation in the federal district court the likelihood of abstention was high, would be tantamount to a repudiation of the wisdom of *Monroe v. Pape*²³ that the federal civil rights remedy is supplementary to state remedies. To guard against abuse, however, the court was willing to inquire whether the federal plaintiff's failure to raise his federal claims in the state court constituted a waiver in the constitutional sense.²⁴ There have been also a handful of

¹⁹*Brown v. Chastain*, 416 F.2d 1012, 1014 (5th Cir. 1969) (Rives, J., dissenting).

²⁰439 F.2d 1285 (9th Cir. 1971).

²¹This view surfaces in other cases as well. For example, the court in *Mack v. Florida State Bd. of Dentistry*, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960 (1971), allowed a due process challenge in federal court to the fairness of a state license revocation, the impartiality of which had been upheld in Florida courts.

²²502 F.2d 631 (2d Cir. 1974).

²³365 U.S. 167 (1961).

²⁴Other voices, some only in dissent, have suggested that section 1983 actions ought to be freed of the bindings of res judicata. See, e.g., *Thistlethwaite v. City of New York*, 497 F.2d 339, 343 (2d Cir.) (Oakes, J., dissenting), *cert. denied*, 419 U.S. 1093 (1974); *Tang v. Appellate Div.*, 487 F.2d 138, 143 (2d Cir. 1973) (Oakes, J., dissenting), *cert. denied*, 416 U.S. 906

decisions which, while less explicit in their rejection of res judicata, have applied it with a unique sensitivity suggestive of a half-way step to outright rejection.²⁵

B. Basic Patterns in Which the Res Judicata Problem Arises

The great increase in federal civil rights litigation,²⁶ the significant number of these cases in which related state litigation is implicated, and the lack of uniformity which prevails in the lower federal courts, all call for authoritative discussion of the problem by the Supreme Court.²⁷ Indeed, the problem is a real one, touching an area of sensitive federal/state relationships, an area of recent especial concern of the Supreme Court, and lately magnified by developments in the area of abstention and federal equitable relief.

In order more fully to appreciate the federal civil rights plaintiff's potential problem, it is helpful to describe the basic patterns that exist wherein prior state litigation is implicated in federal civil rights claims. Of course, the federal plaintiff, in order to be barred or estopped, must have been a party in the state litigation: either as a civil plaintiff, a civil defendant, or as a criminal defendant.

The plaintiff in the federal court who has also appeared as a plaintiff in the state court is perhaps the least worthy supplicant for relief from the full force of res judicata. A typical situation involves a litigant who has unsuccessfully challenged

(1974); *Brown v. Chastain*, 416 F.2d 1012, 1014 (5th Cir. 1969) (Rives, J., dissenting); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *Wecht v. Marsteller*, 363 F. Supp. 1183 (W.D. Pa. 1973); *Howard v. Ladner*, 116 F. Supp. 783 (S.D. Miss. 1953).

²⁵See, e.g., *Mastracchio v. Ricci*, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *Parker v. McKeithen*, 488 F.2d 553 (5th Cir. 1974); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir. 1970); *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963); *Duncan v. Town of Blacksburg*, 364 F. Supp. 643 (W.D. Va. 1973); *Moran v. Mitchell*, 354 F. Supp. 86 (E.D. Va. 1973); *Olson v. Board of Educ.*, 250 F. Supp. 1000 (E.D.N.Y. 1966).

²⁶See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 75-76 n.4 (1973) [hereinafter cited as H. FRIENDLY].

²⁷Some of the Justices themselves have recognized the need and have advocated action. For example, in *Florida State Bd. of Dentistry v. Mack*, 401 U.S. 960 (1971), Justice White and Chief Justice Burger dissented from the denial of certiorari to a suit in which the Fifth Circuit Court of Appeals refused to give res judicata effect to prior state court proceedings. *Mack v. Florida State Bd. of Dentistry*, 430 F.2d 862 (5th Cir. 1970). See also *Lauchli v. United States*, 405 U.S. 965 (1972) (Douglas, J., dissenting), *denying cert.* to 444 F.2d 1037 (7th Cir. 1971).

state conduct—for example, liquor license revocation,²⁸ professional license revocation,²⁹ or discharge from public employment³⁰—in a state court and seeks to have the federal court examine the state activity afresh. However, even this basic pattern may have variations. First, the state litigation may have involved the same essential claims, including the constitutional charges, which are now set before the federal court.³¹ A second variation involves state litigation attacking the same essential course of conduct but without the constitutional imprecations now made the center of attack.³² These cases, at least superficially, call for the application of the doctrines of bar, merger, or direct estoppel³³ as the two claims, federal and state, are essentially the same. A third strain of cases involving a state plaintiff occurs where the conduct challenged in the federal court is, at least in part, the state process in which the plaintiff has met with failure.³⁴ This last model may breed greater sympathy than the usual case of a two-time plaintiff because the alleged offender is the state tribunal itself.

Alternatively, the federal plaintiff may have participated in the state courts as a defendant in civil litigation. In *Duke v. Texas*,³⁵ appellees were the target of a state court injunction from which they sought relief in a section 1983 action in federal court. The federal plaintiff may have been a defendant in a landlord's action seeking possession,³⁶ or a party opposing foreclosure,³⁷ or

²⁸See, e.g., *Wilke & Holzheiser, Inc. v. Reimel*, 266 F. Supp. 168 (N.D. Cal. 1967).

²⁹*Mack v. Florida State Bd. of Dentistry*, 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 960 (1971); *Flynn v. State Bd. of Chiropractic Examiners*, 418 F.2d 668 (9th Cir. 1969).

³⁰*Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974).

³¹See, e.g., *Angel v. Bullington*, 330 U.S. 183 (1947); *Johnson v. Department of Water & Power*, 450 F.2d 294 (9th Cir. 1971); *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961); *Hamilton v. Ford*, 362 F. Supp. 739 (E.D. Ky. 1973); *International Prisoners' Union v. Rizzo*, 356 F. Supp. 806 (E.D. Pa. 1973).

³²See, e.g., *Rios v. Cessna Fin. Corp.*, 488 F.2d 25 (10th Cir. 1973) (counterclaiming defendant in state court becomes federal plaintiff); *Wilke & Holzheiser, Inc. v. Reimel*, 266 F. Supp. 168 (N.D. Cal. 1967).

³³For a general discussion of these doctrines, see RESTATEMENT OF JUDGMENTS §§ 47 (merger), 48 (bar), 45(d), 49(b), 52(d), 52(g) (1942).

³⁴See *Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969).

³⁵477 F.2d 244 (5th Cir. 1973). See also *Community Action Group v. City of Columbus*, 473 F.2d 966 (5th Cir. 1973).

³⁶See, e.g., *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974).

³⁷See, e.g., *Hanley v. Four Corners Vacation Properties, Inc.*, 480 F.2d

annexation.³⁸ The possibilities are myriad. The importance of the distinction between the several postures the federal plaintiff assumed in the state court is yet to be discussed. However, whether the stultifying effects of *res judicata* ought to apply in fullest force, or not at all, may vary with the federal plaintiff's earlier posture, that is, with whether he chose to be in state court or not. As plaintiff, of course, he did; as a defendant, he likely did not. Surely, he did not as a state criminal defendant. The claimed estoppel following a state prosecution can flow from a guilty plea³⁹ or from matters put in issue and litigated—in a motion to suppress⁴⁰ or upon a verdict.⁴¹

Whatever the posture of the party in the state litigation, surely he will benefit from knowledge of the effects the present litigation may have upon his subsequent efforts in a federal forum. Even the state plaintiff should know the full "costs" of his choice to litigate in the state courts. Likewise, the civil defendant may have several tactics at his disposal—counterclaim, defenses, removal—the wisdom of resort to which will be affected by the extent to which later federal litigation will be influenced by their present use in the state court. The choice to forego raising the constitutional issues in the state forum in order to preserve them for federal exposure is most stark for the state criminal defendant, whose very freedom frequently is at stake. He is put to the hardest choice, which, without some notion of the consequences, is all the more cruel.⁴²

C. Res Judicata Problems Arising from Abstention and Related Doctrines

The somewhat incalculable diffidence of the federal courts when constitutional challenges to state law are presented, especially

536 (10th Cir. 1973); *Hardy v. Northwestern Fed. Sav. & Loan Ass'n*, 254 F.2d 70 (D.C. Cir. 1957).

³⁸See *Duncan v. Town of Blacksburg*, 364 F. Supp. 643 (W.D. Va. 1973).

³⁹See, e.g., *Metros v. United States Dist. Court*, 441 F.2d 313 (10th Cir. 1970).

⁴⁰See *Moran v. Mitchell*, 354 F. Supp. 86 (E.D. Va. 1973).

⁴¹See *Mastracchio v. Ricci*, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *Williams v. Liberty*, 461 F.2d 325 (7th Cir. 1972).

⁴²Courts have recognized this Hobson's choice in ameliorating the impact of *res judicata* in a subsequent section 1983 action. See, e.g., *Moran v. Mitchell*, 354 F. Supp. 86 (E.D. Va. 1973). See also Comment, *The Collateral Estoppel Effects of State Criminal Convictions in Section 1983 Actions*, 1975 U. ILL. L.F. 95; 88 HARV. L. REV. 453 (1974). Of course, the convicted defendant may have the habeas corpus avenue left open, but this does not compensate for the loss of the damage remedy provided by the civil rights acts. See *Preiser v. Rodriguez*, 411 U.S. 475 (1973), for consideration of the relationship between habeas corpus and section 1983.

as part of a quest for injunctive or declaratory relief, a diffidence loosely grouped under the "abstention doctrines," further confounds the potential civil rights litigant. For example, a state plaintiff protesting a discharge files a claim in federal court and is met with abstention, the federal court deeming the matter one of unsettled state law a clarification of which might avoid the federal constitutional questions. Relegated to the state court, the state plaintiff makes the mistake of litigating all his claims, federal and state. When, upon losing in the state court, he returns to the federal forum, he is likely to be met with the defense of res judicata.⁴³ Of course, such a party has a chance of federal court review, if only by certiorari. But the federal fact-finding forum has been lost.

A related snare involves the state plaintiff who, anticipating abstention in the federal court and the res judicata effect of prior state litigation, goes first to the state forum but explicitly reserves his federal questions for federal treatment. Again, normal principles of bar or merger will cut off any chance for a federal airing of his federal claim.⁴⁴ Such a litigant, not having injected the federal question in the state case, lacks even the solace of possible Supreme Court review. Justification of initial and full resort to state courts by contending that resort to federal court would have been hollow since the federal court would have abstained in any case apparently will not succeed.⁴⁵ However, at least one federal court has expressed sympathy with a plaintiff's initial resort to state court when abstention is to be anticipated, suggesting that such a process is timesaving in that one step, initial resort to federal court, is cut out.⁴⁶

Nevertheless, whatever its efficiency, the formula laid down over a decade ago by the Supreme Court in *England v. Louisiana State Board of Medical Examiners*⁴⁷ remains the rule. That is, if upon resort to the federal court, abstention seems proper, the court is, with rare exception,⁴⁸ to retain jurisdiction but send the litigants to the state court where the federal questions are to be reserved. In the state court the federal issues should be exposed only to give the state court the benefit of knowing the full range of issues impli-

⁴³See, e.g., *Fisher v. Civil Serv. Comm'n*, 484 F.2d 1099 (10th Cir. 1973).

⁴⁴See, e.g., *Wilke & Holzheiser, Inc. v. Reimel*, 266 F. Supp. 168 (N.D. Cal. 1967).

⁴⁵See *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967).

⁴⁶*Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974), noted in 88 HARV. L. REV. 453 (1974).

⁴⁷375 U.S. 411 (1964).

⁴⁸See, e.g., *Harris County Comm'rs Court v. Moore*, 420 U.S. 77 (1975).

cated. But, "if a party freely and without reservation submits his federal claim for decision by state courts,"⁴⁹ then he has elected to forego return to the federal court.

Unless, then, some soft form of *res judicata* is to apply to civil rights actions, a litigant desiring an original federal forum for his federal claim must always resort first to the federal court even if abstention will likely postpone his federal hearing, and he must take care to comply with the strictures of *England*. State court defendants, civil or criminal, have no such opportunities, except as removal might provide—a provision which in the case of a criminal defendant is, at best, a remote possibility. In effect, then, state court litigants face an exhaustion requirement in the state courts, which when capped by *res judicata* deprives them of a federal forum.⁵⁰

This problem is further exacerbated by the increasing restraint which the Supreme Court has laid upon lower federal courts in which injunctive relief is sought. The developments in this area in the constellation of cases surrounding *Younger v. Harris*⁵¹ have been carefully traced elsewhere.⁵² It is sufficient for present purposes to relate that while section 1983 of the Civil Rights Act was recognized as an exception to the Anti-Injunction Act⁵³ which forbids federal courts to enjoin state court proceedings, the Court made it clear that only in the most unusual cases, cases of egregious bad faith, would enjoining pending state criminal cases be permissible. A similar restraint is to control the grant of declaratory relief affecting pending criminal actions. When state prosecution is not pending, but only threatened, the opportunity for federal injunctive or declaratory relief, while still a sensitive matter of equity and federal/state comity, is greater,⁵⁴ but in any case, the discretionary element always present in the grant of declaratory or equitable relief may leave the federal plaintiff without a federal forum until it is too late.

⁴⁹375 U.S. at 419.

⁵⁰See H. FRIENDLY, *supra* note 26, at 101-07.

⁵¹401 U.S. 37 (1971). See also *Byrne v. Karalexis*, 401 U.S. 216 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971).

⁵²See generally H. FRIENDLY, *supra* note 26, at 96-100; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 250 (1974).

⁵³28 U.S.C. § 2283 (1970). See *Mitchum v. Foster*, 407 U.S. 225 (1972).

⁵⁴*Steffel v. Thompson*, 415 U.S. 452 (1974), suggests that in such a case, declaratory relief should emanate under the normal discretionary considerations for the granting of such relief. Likewise, injunctive relief will issue upon a showing of irreparable harm. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

Latest developments in this area threaten further to confound the litigant. Any hope that the showing required by *Younger* to ignite federal injunctive or declaratory relief in the face of pending state criminal litigation would be minimal was put to rest in the last Term.⁵⁵ In fact, the impact of *Younger* was significantly extended to state noncriminal proceedings as well as to state prosecutions begun soon after the federal civil rights claim has been commenced.

In *Huffman v. Pursue, Ltd.*,⁵⁶ local state officials, pursuant to a state public nuisance statute, instituted proceedings to seize appellee's film as obscene as well as to close down appellee's theater. The state court found the film to be obscene. Rather than appeal the state decision, the appellee instituted a section 1983 action attacking the statute and its application. A three-judge federal court granted relief, but the Supreme Court, through Justice Rehnquist, held the principles of *Younger* to govern. While recognizing that the state proceedings were civil in nature, the Court understood them to be in many respects akin to criminal proceedings, so much so that the federal court interference would have the same impact as the enjoining of state criminal actions. More startling, however, was the Court's response to appellee's contentions that since the state proceedings were completed, the state interests promoted by *Younger* had vanished. To the contrary, "we believe that a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court."⁵⁷

Moreover, the appellee was admonished that this extension of *Younger* could not be avoided "by simply failing to comply with the procedures of perfecting its appeal"⁵⁸ within the state judicial system. The implication left is that if the appellee has failed to perfect an appeal in a timely fashion, the appellee is out of luck at all turns. But even if he has exhausted his remedies in the state system, what succor may be found in the federal court if normal principles of res judicata apply? Again, in *Huffman* the Court suggested, but did not confirm, the possibility that res judicata will foreclose federal court consideration of his federal claims.⁵⁹ Therefore, as the federal courts are required to shunt more cases to the state system, the cost will be the loss

⁵⁵See, e.g., *Kugler v. Helfant*, 421 U.S. 117 (1975).

⁵⁶420 U.S. 592 (1975). Three justices dissented.

⁵⁷*Id.* at 608.

⁵⁸*Id.* at 611 n.22.

⁵⁹*Id.* at 606 n.18, 607-08 n.19.

of a federal fact-finding forum⁶⁰—unless normal principles of res judicata are found not applicable.

In *Hicks v. Miranda*,⁶¹ *Younger* principles were extended to federal civil rights actions begun before any state prosecution, at least where the federal litigation has not progressed beyond an embryonic state, that is "before any proceedings of substance on the merits have taken place in the federal court."⁶² As suggested by Justice Stewart in dissent, such a rule "is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction."⁶³ If res judicata applies fully, the "defeat" is total, unless a basis for habeas corpus relief exists.⁶⁴

II. THE ROLE OF STATUTORY FULL FAITH AND CREDIT

The fundamental pattern with which we are concerned involves state court litigation followed by related federal court civil rights litigation. The question to be resolved is what effect or credit is to be given the state action in the subsequent federal action. At least superficially, it appears that Congress had undertaken to provide an answer to that question.

Such Acts, records and judicial proceedings [of any State, Territory, or Possession of the United States] or copies thereof . . . 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.⁶⁵

⁶⁰The Supreme Court recognized this interest as real in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964).

⁶¹422 U.S. 332 (1975). See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

⁶²422 U.S. at 349.

⁶³*Id.* at 357 (Stewart, J., dissenting).

⁶⁴The relationship between habeas corpus and section 1983 remedies is somewhat hazily drawn in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). If one is attacking custody, then habeas corpus, which requires exhaustion of state remedies, is the proper mode; if damages for the conditions of custody are sought, then section 1983 is open—as long as the federal court does not abstain. Dangers, however, inhere in the pursuit of both remedies at once: the efforts to exhaust state remedies as a precondition to habeas corpus may result in state judgments estopping the section 1983 claim if the conviction underlying the custody has not already done so.

⁶⁵28 U.S.C. § 1738 (1970). The first two paragraphs of the statute provide:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by af-

The statutory full faith and credit provision is an old law. Its essential provisions have remained virtually unchanged for 185 years.⁶⁶ The force of statutory full faith and credit was early litigated in *Mills v. Duryee*,⁶⁷ in which Francis Scott Key's contention that sister state judgments need only be credited as evidence was rejected by the Supreme Court through Justice Story. That sister state judgments worthy of full faith and credit are entitled to be viewed as res judicata and to receive the same force and effect as they would in the courts of the state where they were rendered was thus established as the intendment of the full faith and credit statute. Supreme Court holdings in this regard have been generally consistent to the present. Justice Story's view was reiterated by Justice Marshall in *Hampton v. McConnel*,⁶⁸ the holding of which was described as essentially intact in 1942.⁶⁹ Nothing has occurred since *Hampton* to disturb the general rule.

Essentially, the statute makes "that which has been adjudicated in one state res judicata to the same extent in every other."⁷⁰ It seems correct to say that the "full faith and credit implemented by federal statute (28 U.S.C. § 1738) is the means by which state adjudications are made res judicata."⁷¹ Moreover, as the statute by its terms demands, the usual rule where full faith and credit is due is "that the precise extent to which a judgment rendered in another state is conclusive as to both the rights of the parties and the facts involved, is determined by the law of the state in which

fixing 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 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.

⁶⁶The provision was first enacted in 1790, Act of May 26, 1790, 1 Stat. 122; slight modifications occurred in 1804, Act of March 27, 1804, 2 Stat. 298, and again in 1948, Act of June 25, 1948, ch. 646, 62 Stat. 947. See generally Costigan, *The History of the Adoption of Section 1 of Article IV of the United States Constitution*, 4 COLUM. L. REV. 470 (1904); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. (1945). Debate at the Convention, and in the ratification debates was brief, cryptic, and uninformative. Only *The Federalist*, No. 42 makes brief mention of the constitutional clause. Nevertheless, it was widely deemed an essential aspect of a firm union.

⁶⁷11 U.S. (7 Cranch) 302 (1813).

⁶⁸16 U.S. (3 Wheat.) 110 (1818).

⁶⁹*Williams v. North Carolina*, 317 U.S. 287, 294 (1942).

⁷⁰*Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943).

⁷¹*Batiste v. Furnco Constr. Co.*, 503 F. 2d 447, 450 (7th Cir. 1974). See generally Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Court*, 66 MICH. L. REV. 1723 (1968).

the judgment was rendered.”⁷² That is, “[w]hether the judgment of a state is *res judicata* [in a federal court] is a question of state law.”⁷³ Thus, in *American Surety Co. v. Baldwin*,⁷⁴ a surety on a supersedeas bond called upon to pay its principal’s judgment challenged unsuccessfully the entry of judgment against it in Idaho state courts. The company then sought relief in federal district court, raising, among other things, the constitutional fairness of the state proceedings—a matter not raised in the state courts. Justice Brandeis answered: “[T]he federal remedy was barred by the proceedings taken in the state court which ripened into a final judgment constituting *res judicata*.”⁷⁵ Moreover, the determination of the effect of the judgment as *res judicata* was to be guided by Idaho law.⁷⁶

The proper scope and application of section 1738 is, therefore, not unduly clouded. Nevertheless, despite the fact that the construction of statutory full faith and credit has survived apparently unchanged from *Mills*,⁷⁷ as Justice Jackson noted about the parallel constitutional clause, “judges not infrequently decide cases to which it would apply without mention of it.”⁷⁸ Occasionally, the failure to attend the statute arguably breeds the wrong result—as in *Howard v. Cadner*,⁷⁹ where the court’s half-truth—that *res judicata* is a matter of federal law⁸⁰—led it to ignore prior related state litigation. Equally perplexing is the discussion in *Parker v.*

⁷²H. GOODRICH & E. SCHOLES, *CONFLICT OF LAW* 408 (4th ed. 1964). See also *RESTATEMENT (SECOND) OF CONFLICTS* §§ 94-97 (1971).

⁷³*Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 11 (1939) (Hughes, C.J., concurring).

⁷⁴287 U.S. 156 (1932).

⁷⁵*Id.* at 164.

⁷⁶*Id.* at 166. See also *Angel v. Bullington*, 330 U.S. 183 (1947).

⁷⁷See, e.g., *Carroll v. Lanza*, 349 U.S. 408 (1955); *St. John v. Wisconsin Employment Relations Bd.*, 340 U.S. 411 (1951); *United Nat’l Bank v. Lamb*, 337 U.S. 38 (1949); *Riley v. New York Trust Co.*, 315 U.S. 343 (1942); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Davis v. Davis*, 305 U.S. 32 (1938); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912); *Union & Planters’ Bank v. City of Memphis*, 189 U.S. 71 (1903); *Hancock Nat’l Bank v. Farnum*, 176 U.S. 640 (1900); *Embry v. Palmer*, 107 U.S. 3 (1882); *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 270 (1839).

⁷⁸Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM L. REV. 1, 3 (1945).

⁷⁹116 F. Supp. 783 (S.D. Miss. 1953).

⁸⁰Of course the scope of section 1738 is a matter of federal law, but it refers to state law, with federal law supplying some kind of outer limits. Within those limits, the law of the first forum controls.

McKeithen,⁸¹ in which the court described itself as uncertain as to whether the effect of prior state litigation is to be governed by principles of collateral estoppel or the strictures of section 1738. Presumably, as the prior discussion indicates, the statute controls and guides one to the application of state collateral estoppel principles.

Most frequently, a court, whose decision may be otherwise unobjectionable, proceeds without mention of the statute, often citing federal cases for the determination as to the proper scope of *res judicata*.⁸² Even the Supreme Court is not free from this oversight.⁸³ Whatever the reasons for the frequent inattention to the statute, by its express terms, it appears to control the question of the extent to which prior state litigation is to be honored in related federal litigation. Therefore, one arguing that *res judicata* ought not to apply in federal civil rights actions must confront the meaning and compulsion of section 1738.

As Justice Douglas has reminded us, "*res judicata* is not a constitutional principle."⁸⁴ At the same time, the statutory command of full faith and credit contains no express exceptions. Hence, the question is whether an implied exception to section 1738 can be justified. Not a few jurists and commentators have recommended that indeed civil rights actions are, or ought to be, exceptions to section 1738. Mr. Justice Douglas, dissenting from a denial of certiorari, thought it clear that collateral estoppel principles are as inappropriate in civil rights actions as in habeas corpus proceedings.⁸⁵

⁸¹488 F.2d 553 (5th Cir. 1974). In *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *appeal dismissed sub nom. Metropolitan Dade County v. Aerojet-General Corp.*, 96 S. Ct. 210 (1975), the court held that the law of the jurisdiction rendering the decision urged as *res judicata* governs its effect. Hence if the first litigation was in a federal court, even in diversity, federal law is held to govern its future effect. This pattern raises unique *Erie* problems.

⁸²*See, e.g.,* *Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert denied*, 419 U.S. 1093 (1974); *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967); *Frazier v. East Baton Rouge Parish School Bd.*, 363 F.2d 861 (5th Cir. 1966); *Chesapeake Indus., Inc. v. Wetzel*, 265 F.2d 881 (6th Cir. 1959).

⁸³*See, e.g.,* *Grubb v. Public Util. Comm'n*, 281 U.S. 470 (1930); *Phelps v. Harris*, 101 U.S. 370 (1879).

⁸⁴*England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 429 (1964) (Douglas, J., concurring).

⁸⁵*Lauchli v. United States*, 405 U.S. 965 (1972) (Douglas, J., dissenting), *denying cert.* to 444 F.2d 1037 (7th Cir. 1971). *See also* *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (Brennan, J., dissenting); *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (Brennan, J., dissenting); *Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974); *Mastracchio v. Ricci*, 498 F.2d 1257

Those who would find federal civil rights actions as exceptions to the full faith and credit statute argue from the unique nature of the nineteenth century civil rights acts. In recognizing section 1983 as an exception to the Anti-Injunction Act,⁸⁶ the Supreme Court in *Mitchum v. Foster*⁸⁷ described the legislative history of the Civil Rights Act of 1874, of which the present section 1983 was section 1, as revealing Congress' intent to alter significantly "the relationship between the States and the Nation with respect to the protection of federally created rights"; that, in fact, the antipathy of state officers, including state judicial officers, could only be avoided by access to a federal forum; and that section 1983, *inter alia*, must be considered a unique federal remedy, supplementary to other traditional remedies that might be available.⁸⁸ From the Court's view of section 1983, a view that can be fairly described as orthodox, it is said to follow that a special or no type of res judicata ought to operate in federal actions based upon the section.

It is not necessary here to describe in detail nor to evaluate the special nature of civil rights statutes. It is sufficient for the purposes of this discussion to note it, and to further note that the rationale of cases such as *Mitchum* carries plausibly over to the problem with which we are concerned—the effect of res judicata and of section 1738 in civil rights actions. Many agree that the matter should be settled,⁸⁹ one way or another.

The remainder of this Article will consider the developed contours of section 1738, with an eye to sketching alternative ra-

(1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *Thistlethwaite v. City of New York*, 497 F.2d 339, 343 (2d Cir.) (Oakes, J., dissenting), *cert. denied*, 419 U.S. 1093 (1974) (Douglas, J., dissenting); *Brown v. Chastain*, 416 F.2d 1012, 1014 (5th Cir. 1969) (Rives, J., dissenting); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 250 (1974); 43 FORDHAM L. REV. 459 (1974); 88 HARV. L. REV. 453 (1974); 1974 WIS. L. REV. 1180. Perhaps note should also be made of comments, such as those appearing in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964), which recognize the lack of an adequate substitute for federal factfinding.

⁸⁶28 U.S.C. § 2283 (1970).

⁸⁷407 U.S. 225, 242 (1972).

⁸⁸See also *Zwickler v. Koota*, 389 U.S. 241 (1967); *Monroe v. Pape*, 365 U.S. 167 (1961); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963). McCormack, *supra* note 85, contains a valuable and comprehensive discussion of the impact of section 1983 upon the federal balance. See also Averitt, *Federal Section 1983 Actions After State Court Judgments*, 44 U. COL. L. REV. 191 (1972).

⁸⁹See, e.g., *Florida State Bd. of Dentistry v. Mack*, 401 U.S. 960 (1971) (Burger, C.J. & White, J., dissenting), *denying cert. to* 430 F.2d 862 (5th Cir. 1970).

tionales for making civil rights actions total or partial exceptions to the normal effect of the section. Such an examination may reveal that there exist already sufficient precedent and doctrinal bridge-work to justify treating civil rights actions specially—either by ignoring any *res judicata* effect of prior state litigation or by according it only limited force.

III. EXCEPTIONS TO SECTION 1738

A. General Considerations

As was noted earlier, *res judicata* is not a “constitutional principle.”⁹⁰ It is generally conceded that overriding public policy or the peril of injustice may mitigate or banish the effects of *res judicata*. As Professor Moore states, *res judicata* is a salutary principle, “but at times there is considerable truth in the observation that *res judicata* renders white black, the crooked straight.”⁹¹

Despite statements of the Supreme Court that “we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*,”⁹² as the following discussion will demonstrate, there are several recognized exceptions or qualifications to the effects of *res judicata* as applied through full faith and credit. For example, considering the obligation to accord full faith and credit to a state tax judgment that was arguably penal in nature, the Court declared:

Such exception as there may be to this all-inclusive command [of full faith and credit] is one which is implied from the nature of our dual system of government, and recognizes that consistently with the full faith and credit clause there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another.⁹³

Surely, if one state’s policy may justify rejection of another’s judgment, then “well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738.”⁹⁴

Almost three decades ago, Professor Cleary remarked that the frequent apologies that accompany *res judicata* applications

⁹⁰See text accompanying note 84 *supra*.

⁹¹1B MOORE’S FEDERAL PRACTICE ¶0.405 [12], at 787 (2d ed. 1974).

⁹²*Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

⁹³*Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273 (1935).

⁹⁴*American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972).

suggested a need for re-examination of the principles.⁹⁵ For the most part, of course, his call has not been heeded. Quite to the contrary, *res judicata*'s preclusionary tide has been rising.⁹⁶ Nevertheless, where special circumstances suggest the need, at least in one narrow inlet, to pull against that tide, Cleary's insight into the underlying rationales of *res judicata* is worth rehearsing. He found four major needs which the doctrine was supposed to serve: (1) avoiding a danger of double recovery, (2) promoting stability of law, (3) protecting against vexatious litigation, and (4) supporting efficient use of the courts.

Each of these is a worthwhile end, which at times may be outweighed by competing values, such as the assurance of a real day in court, or may be subserved as well by a more discriminating application of *res judicata*. For example, if the evil to be avoided is double recovery, the second court may examine the record to see if double recovery is indeed sought. If not, at least one justification for barring the second action may be set aside. In considering the extent to which a federal court must attach conclusive effect to prior state court proceedings, it is well to keep in mind that what is involved is a federal question⁹⁷ enwrapping a state law question in the same fashion as in the determination of the law to be applied in diversity suits. That is, while section 1738 commands reference to state law principles of *res judicata*, federal law governs the timing and scope of that command and fixes the outer limits permitted to a state's preclusionary rules. Therefore, the weighing and choosing of competing values is, in the first instance at least, a federal equation in which the state rules of *res judicata* operate as a known component.

A frequent proposal made by courts⁹⁸ and commentators⁹⁹ is that federal civil rights actions should operate as exceptions to section 1738, or, at the least, call forth a more discerning and sensitive approach to the question of the preclusionary effect of prior related state court litigation. What are the recognized exceptions to section 1738 and the application of *res judicata*?

⁹⁵Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).

⁹⁶See, e.g., Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 172 (1968); Vestal, *Res Judicata/Preclusion: Expansion*, S. CAL. L. REV. 357 (1974).

⁹⁷See, e.g., *Adams v. Saenger*, 303 U.S. 59, 64 (1938); Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330, 341 (1944).

⁹⁸See, e.g., *Ney v. California*, 439 F.2d 1285 (9th Cir. 1971), and cases cited notes 24 & 85 *supra*.

⁹⁹See, e.g., Averitt, *supra* note 88.

B. Some Established Exceptions to Res Judicata in Section 1738 Cases

Of course, it has long been textbook law that the second forum may examine the jurisdictional bases of the first forum and that a judgment rendered without jurisdiction is not entitled to credit.¹⁰⁰ On the other hand, if jurisdiction has been or could have been litigated in the first forum, later litigation typically will be precluded.¹⁰¹

Having noted these general principles, and granting that the "explicit direction [of section 1738] should be disregarded by the Supreme Court only on very strong grounds,"¹⁰² we may turn to an examination of exceptions.

In *Durfee v. Duke*,¹⁰³ a suit to quiet title to river bottom land was commenced in a Nebraska court. The court's power depended on the situs of the land, which in turn depended on whether the river had shifted course by avulsion or accretion. The Nebraska court found it had jurisdiction. The disappointed party then sued in a Missouri court to quiet title, claiming the land to be in Missouri. Upon removal, the federal district court thought the issue concluded by the first suit. The Eighth Circuit reversed. In the Supreme Court, Justice Stewart noted first the general rule:

Full faith and credit thus generally requires every state to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it.¹⁰⁴

Yet, the Justice continued, in some cases, although *Durfee* was not one of them, countervailing considerations may be present which justify a subordination of the *res judicata* principles: that is, the policies underlying *res judicata* may be outweighed by that against permitting the court to act beyond its jurisdiction.¹⁰⁵ Thus *Durfee* introduced the notion that there are inter-

¹⁰⁰See, e.g., *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Armstrong v. Armstrong*, 350 U.S. 568 (1956); *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Christmas v. Russell*, 72 U.S. (5 Wall.) 290 (1866).

¹⁰¹See, e.g., *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931); *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192 (1825).

¹⁰²Cheatham, *supra* note 97, at 374. See also Annot., 88 L. Ed. 389 (1944).

¹⁰³375 U.S. 106 (1963).

¹⁰⁴*Id.* at 109.

¹⁰⁵*Id.* at 114, citing, *inter alia*, RESTATEMENT OF JUDGMENTS § 10 (1942); RESTATEMENT OF CONFLICT OF LAWS § 451(2) (Supp. 1948). For a statement of the general rule, see *United States v. Silliman*, 167 F.2d 607, 614 (3d Cir. 1948).

ests sufficient to override the preclusive effect of prior state litigation, interests of unique federal concern, touching not only upon the limited role of article III courts, but as well, for example, upon patents. Thus, in *Mercoïd Corp. v. Mid-Continent Investment Co.*,¹⁰⁶ the Court refused to accord the full bar of res judicata where to have done so would have involved the Court in "placing its imprimatur on a scheme which involves a misuse of the patent privilege and a violation of the anti-trust laws."¹⁰⁷

Perhaps the best known of cases in which competing policies submerge those of res judicata is *Commissioner v. Sunnen*.¹⁰⁸ In *Sunnen*, the Supreme Court explicated the peculiar problems created by the undiluted application of res judicata in tax cases. Where collateral estoppel would promote inequality between similarly situated, even competing, taxpayers, the general principles of res judicata must give way.¹⁰⁹ The special predicament of tax cases was well enough known so that the lower federal courts, even before the major exposition of *Sunnen*, had recognized the need for special preclusive rules.¹¹⁰ For example, Judge Magruder had noted that a rigid adherence to res judicata may in fact spawn litigation—as when the Commissioner insisted that a taxpayer be bound by a prior judgment despite supervening legal developments which benefitted such taxpayers. Had the Commissioner admitted the insubstantial role to be accorded res judicata in tax cases, the taxpayer would never had been compelled to sue.¹¹¹ Cases recognizing the legitimacy of the forum's revulsion to enforcement of another sovereign's penalties also acknowledge the propriety of weighing competing interests against those of res judicata.¹¹²

¹⁰⁶320 U.S. 661 (1944).

¹⁰⁷*Id.* at 670. The consideration of the countervailing federal interest which may supersede the state res judicata principles is not unlike that involved in certain problems of choice of law in diversity cases. *See, e.g.*, *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942).

¹⁰⁸333 U.S. 591 (1947).

¹⁰⁹*See, e.g.*, *United States v. Stone & Downer Co.*, 274 U.S. 255 (1927).

¹¹⁰*See, e.g.*, *Henricksen v. Seward*, 135 F.2d 986 (9th Cir. 1943).

¹¹¹*Pelham Hall Co. v. Hassett*, 147 F.2d 63 (1st Cir. 1945).

¹¹²*See, e.g.*, *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888). Compare cases such as *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373 (1903), in which New York's refusal to enforce an Illinois judgment, a refusal premised on the fact that New York law did not allow suits against foreign corporations, was upheld.

A recurring casebook selection, *Spilker v. Hankin*,¹¹³ refused to estop a defendant from raising claims of overreaching in defense to actions upon a series of notes which she had executed in favor of plaintiff, a lawyer, as payment for legal services. The plaintiff had already sued successfully on one of the series of notes. Although recognizing that ordinarily she would be precluded from raising the defense, the court thought the special fiduciary position of the plaintiff and the unique interest which courts have in the propriety of such relationships amounted to sufficient countervailing conditions justifying abrogation of the normal res judicata bar. *Spilker*, then, more than many other cases refusing to accord full effect to prior adjudications, makes explicit the factor of injustice to a party, rather than a sovereign policy, as worthy of account in the calculus of successive related cases.

Despite *Spilker*, the strongest cases for exceptional treatment of prior litigation are those in which a distinct national policy can be discerned and articulated. Such a case is *Batiste v. Furnco Construction Corp.*¹¹⁴ Seeking relief from alleged employment discrimination,¹¹⁵ the plaintiffs had filed a complaint with the state commission empowered to remedy such wrongs. The state commission had awarded plaintiffs jobs and back pay. Defendant argued that because state law accorded full res judicata effect to the decisions of the state commission, the federal court, under the compulsion of section 1738, must do likewise.

The court acknowledged the usual force and command of section 1738, but found to be overriding "a strong Congressional policy that plaintiffs not be deprived of their right to resort to federal court for adjudication of their federal claims under Title VII."¹¹⁶ This conclusion, however, was not based solely on the importance of the federal rights involved, nor upon a recognition that the post-Civil War civil rights acts, such as section 1981, skewed the federal balance, but rather upon the text of section 2000e-5(b) of title 42, in which recourse to the relevant state tribunal is called for, but final responsibility, according appropriate weight to the state findings, rested upon the federal courts. The court discerned a license to apply rules of preclusion cautiously and sparingly.

The unique federal interest, however, more often is discerned in the statutory treatment of jurisdiction. If Congress has prescribed the matter as being exclusively for the federal

¹¹³188 F.2d 35 (D.C. Cir. 1951).

¹¹⁴503 F.2d 447 (7th Cir. 1974).

¹¹⁵The federal actions were premised on 42 U.S.C. §§ 1981 & 2000e (1970).

¹¹⁶503 F.2d at 450.

courts, the federal interest can be considered of unique weight—at least as compared with the policies of *res judicata*. The foremost of these cases is *Kalb v. Feuerstein*.¹¹⁷ In *Kalb* a state judgment of foreclosure and a subsequent sale were held void because at the time of the judgment the possessor of the land had filed a petition in bankruptcy. The Supreme Court considered the congressional power over bankruptcy to be sufficient to oust a state court of jurisdiction over a petitioner's property and construed the pertinent provision of the Bankruptcy Act to place a farmer-debtor within the exclusive reach of the federal courts. Hence the state proceedings were entitled to no credit—they were, in fact, a nullity.

The force of *res judicata* was likewise dissipated when a lessee of Indian lands, sued for lease royalties, succeeded in establishing a counterclaim against the United States.¹¹⁸ In a subsequent suit, the counterclaim was put forth as *res judicata*. The plea was rejected because the first court was without jurisdiction to hear claims against the United States.

Similarly, a recent action by the Government under the Economic Stabilization Act¹¹⁹ raised the question of the Act's application to state employees.¹²⁰ State officials pled in bar a prior state court judgment. Aside from serious doubts as to the validity of the state judgment, it, in any case, had to give way before the national interest which called for exclusive federal court jurisdiction. Thus, when Congress has provided for exclusive federal court jurisdiction, state judgments are a nullity.

Of course, the great number of civil rights actions are not within the exclusive jurisdiction of the federal courts. State courts are fully competent to hear section 1983 actions, for example. Thus, the preceding discussion, while providing further illustration of the proposition that section 1738 is not inexorable when a unique national interest exists, is incomparable to the extent that Congress has never implied its disdain for related state adjudication by providing for exclusive federal jurisdiction. In fact, there are cases holding that when a plaintiff institutes a state

¹¹⁷308 U.S. 433 (1940).

¹¹⁸*United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940).

¹¹⁹12 U.S.C.A. § 1904 note (Cum. Supp. 1976).

¹²⁰*United States v. Ohio*, 487 F.2d 936 (Temporary Emer. Ct. App. 1973). The Government sought to enjoin the State of Ohio from violating Executive Order 11695, which arose out of the Economic Stabilization Act. The Order was revoked on June 18, 1974, by Executive Order 11750. See also *Denver Bldg. & Constr. Trades Council v. NLRB*, 186 F.2d 326 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 675 (1951) (recognizing the importance of congressional intent in determining the impact of *res judicata*).

law action and then a federal action seeking recovery for the same conduct but upon a federal remedy exclusively for federal cognizance, the plaintiff will be bound by the state judgment. He will be deemed to have elected his remedy despite the fact that the federal claim could not have been brought in the state court and hence was not, strictly speaking, available. Thus the results of a state court action under state antitrust laws barred a later federal antitrust action.¹²¹ If federal courts are willing to preclude a party for selecting a state court where the federal action was not available, surely they might be more willing to preclude a plaintiff who resorts to a state forum but fails to include an available federal action.

A separate, but related, problem involves the effect to be given to state court determinations of issues normally within exclusive federal reach but emerging in state law actions, most often as defenses. It is generally conceded that nothing prevents state courts from resolving the federal issue as it affects the case before it.¹²² Thus a parallel to our present problem is present: What effect is to be given to the determination of these issues in subsequent federal litigation when the same issues re-emerge?

Judge Hand, in his well-known opinion in *Lyons v. Westinghouse Electric Corp.*,¹²³ concluded, despite precedent to the contrary,¹²⁴ that the resolution of the federal issue, although effective in the state suit, cannot be deemed binding in the later federal action. Thus, the resolution of the defense to a state action of raising the claim that plaintiffs had conspired illegally to restrain trade was held not binding in a subsequent federal antitrust action in which defendant sought damages.¹²⁵ The strong federal policies presumably implicit in the jurisdictional exclusivity and a need for uniformity impelled Judge Hand's conclusion.

¹²¹*Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964). *Cf. International Ry. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967); RESTATEMENT (SECOND) OF JUDGMENTS § 61.1, comment *e* (Tent. Draft No. 1, 1973). *See also Singer v. A. Hollander & Sons*, 202 F.2d 55 (3d Cir. 1953); *Connelly v. Balkwill*, 174 F. Supp. 49 (N.D. Ohio 1959), *noted in* 69 YALE L.J. 606 (1960); *Kaufman v. Schoenberg*, 154 F. Supp. 64 (D. Del. 1954).

¹²²*See, e.g., MacGregor v. Westinghouse Elec. & Mfg. Co.*, 329 U.S. 402 (1947); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360 (1967).

¹²³222 F.2d 184 (2d Cir.), *cert. denied*, 345 U.S. 923 (1955).

¹²⁴*See, e.g., United States v. Silliman*, 167 F.2d 607 (3d Cir. 1948); *Straus v. American Publishers' Ass'n*, 201 F. 306 (2d Cir. 1912), *appeal dismissed*, 235 U.S. 716 (1914).

¹²⁵RESTATEMENT (SECOND) OF JUDGMENTS § 68.1, comment *e* (Tent. Draft No. 1, 1973); RESTATEMENT OF JUDGMENTS § 71 (1942).

The foregoing examples illustrate that section 1738 is something less than an inexorable command; when substantial federal policies would be imperilled by a rigid application of the prior state court determination, the latter, although not itself void, will not be credited.

C. Habeas Corpus

Habeas corpus provides the most well-established exception to the usual binding effect of prior state court litigation. Furthermore, the writ is designed to remedy invasions of constitutional liberties, the same type of wrong at which federal civil rights acts are aimed. In fact, of course, the blending of function between habeas corpus and section 1983 actions has spawned much discussion, at the center of which is the case of *Preiser v. Rodriguez*.¹²⁶

Preiser involved civil rights actions by prisoners seeking restoration of good time. Although the habeas corpus route was open, the advantage in the civil rights action was that no exhaustion of state remedies was required. The Supreme Court held that if habeas corpus was available and potentially efficacious, it was the proper remedy.¹²⁷ The entire Court, despite fundamental disagreement on the role of section 1983 vis-a-vis habeas corpus, agreed that "[p]rinciples of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings."¹²⁸

The justifications for such exceptional treatment have been examined elsewhere,¹²⁹ and many of them harmonize with a parallel easing of *res judicata* in section 1983 actions. For example, in *Fay v. Noia*,¹³⁰ Justice Brennan stated:

[T]he familiar principle that *res judicata* is inapplicable in habeas proceedings . . . is really but an instance of the

¹²⁶411 U.S. 475 (1973).

¹²⁷The Court recognized that damages were not available in habeas corpus. Therefore, if damages rather than custodial adjustments were the goal, section 1983 was presumably available as an alternative, or even supplemental, remedy.

In dissent, Justice Brennan, joined by Justices Douglas and Marshall, argued that the potential for simultaneously pursuing split remedies—habeas corpus for release and section 1983 for damages—would tend to magnify confusion and federal/state conflict, especially insofar as doubt remained about the *res judicata* effect of state court litigation in subsequent civil rights actions—a matter upon which the majority and dissenters disagreed. Compare 411 U.S. at 493-94, with *id.* at 509 n.14.

¹²⁸*Id.* at 497.

¹²⁹E.g., Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1113 *et seq.* (1970).

¹³⁰372 U.S. 391 (1963).

larger principle that void judgments may be collaterally impeached.¹³¹

And at least since *Brown v. Allen*,¹³² the "voidness" of which Justice Brennan spoke stems from a deprivation of constitutional rights, the same claim that is made in a federal civil rights action. Of course, there are differences between habeas corpus and civil rights actions; among them, the history of the Great Writ has always made it an exceptional proceeding, in part, at least, because of the serious burden—deprivation of liberty—under which the petitioner suffers.

The habeas procedure, expounded first by the Supreme Court¹³³ and then by Congress,¹³⁴ does not ignore wholly the state proceedings. It may be said that *res judicata* operates in habeas corpus, but in a severely diluted fashion. Briefly, the state finding is presumptively correct unless it is shown or it appears that the state proceedings were inadequate, insufficient, truncated, or otherwise not fully satisfactory. If such is the case, the federal court is to conduct its own factual hearing. Even if the state court proceedings appear adequate, the federal court may, in its discretion, conduct a fact hearing, although the petitioner's burden in such an instance is to establish error "by convincing evidence."¹³⁵

The real significance of federal court factfinding, so honored in present habeas corpus procedure, has concerned the Court in other contexts as well, notably litigation involving a claim of deprivation of constitutional rights. The supportive references in such cases to the habeas mode are telling.¹³⁶ These comments arise in the context of abstention—formally a temporary and limited deferral by the federal to the state court system. While some recent signs suggest that the Court will encourage even greater diffidence by the federal courts in abstention cases,¹³⁷ presumably a federal plaintiff faced with abstention may still preserve a chance for a federal fact hearing by reserving the federal claims during his state court sojourn.¹³⁸ What is pre-

¹³¹*Id.* at 423.

¹³²344 U.S. 443 (1953).

¹³³*Townsend v. Sain*, 372 U.S. 293 (1963).

¹³⁴28 U.S.C. § 2254 (1970).

¹³⁵*Id.* § 2254(d).

¹³⁶*England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 417 n.8 (1964).

¹³⁷*See, e.g., Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

¹³⁸The federal plaintiff who seeks to enjoin state proceedings and cannot surmount the *Younger* hurdles, is, unlike the true abstention case plaintiff, hit with dismissal and with no promise of returning to federal court (except the Supreme Court on review).

served then, in abstention cases as well as habeas corpus cases, is a shot at the federal forum so long as that chance is not waived either by failing to reserve the federal question, or, in the habeas corpus context, by freely and voluntarily foregoing available state procedures capable of considering petitioner's constitutional claim.

D. A Special Res Judicata

The waiver technique has been applied by at least one court to the central problem presented in this Article: state litigation followed by a federal civil rights action. In *Lombard v. Board of Education*,¹³⁹ the Second Circuit Court of Appeals, impressed with the supplementary character of section 1983, searched the state proceedings leading to the plaintiff's discharge from employment as a public school teacher to determine if his failure to raise the constitutional issues constituted a waiver. While such an approach does not make clear how a state litigant wishing to get a federal fact hearing could do so without having waived his chance to present his constitutional claims, the case does illuminate the possibility of a sensitive look at the state proceedings rather than an inflexible application of res judicata without regard to the unique federal interests involved.

In other words, the strong federal interest may be respected by mitigating the effects of res judicata rather than by a total rejection of these doctrines, which do, after all, serve valid purposes. The notion of "special res judicata" when federal civil rights are at stake has been suggested by some federal courts,¹⁴⁰ as well as by commentators,¹⁴¹ as an alternative to treating all state court judgments containing constitutional error as void, a proposition somewhat contrary to entrenched precedent.¹⁴²

When one assays the dilemma of certain state court litigants, particularly state criminal defendants, there is more reason to embrace, at the least, a sensitivity toward application of principles of res judicata. Although many have noted the trend toward

¹³⁹502 F.2d 631 (2d Cir. 1974).

¹⁴⁰See, e.g., *Mastracchio v. Ricci*, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975). *Pelham Hall Co. v. Hassett*, 147 F.2d 63 (1st Cir. 1945), and *Henricksen v. Seward*, 135 F.2d 986 (9th Cir. 1943), are indicative of a special caution in some tax cases.

¹⁴¹See, e.g., *Averitt*, *supra* note 88, at 208; McCormack, *supra* note 85. One commentator has suggested that the preclusionary principles of habeas corpus simply be resorted to in civil rights actions. Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 U. ILL. L.F. 95.

¹⁴²See, e.g., *Angel v. Bullington*, 330 U.S. 183, 187 (1947). The exceptional nature of habeas corpus is thus highlighted.

a spreading of preclusionary rules,¹⁴³ there has been as well a willingness to compare the present and former trial environments to determine if the matters assertedly settled were in fact considered in any real or complete sense.¹⁴⁴ If the environments between the actions differ significantly, preclusionary rules may then be wielded with a more delicate touch.

The state defendant, particularly the state criminal defendant, is in a singularly sympathetic position. Faced with a tribunal not of his choosing and possibly not to his liking, he nevertheless must present his constitutional defenses, which are the stuff of his future civil rights action, or stand mute in the face of the state's case. Yet, having raised constitutional defenses, he will be bound by their resolution—if preclusion principles are applied in full—and thus be precluded from an effective federal hearing. The chances of removal or review in the Supreme Court are little consolation. Even habeas corpus, while available to an unsuccessful criminal defendant, will not provide any kind of reparation.¹⁴⁵ What, furthermore, of the state civil defendant who has not constitutional defenses, but a counterclaim of constitutional stature and of a compulsory nature? Presumably, he is forced to litigate in the state forum without any hope of removal. Similarly, abstention doctrines and the cases in the *Younger* line have taught some potential plaintiffs the futility of initial recourse to federal courts.

It has been thought that a state litigant, even a state plaintiff who could not obtain relief in the federal courts because of abstention or the reluctant equity prescribed by *Younger*, ought not to be precluded from later recourse to the federal court. At least one federal court has commented that requiring initial resort to federal court only to face abstention, causing a trek to the state court where, if practical, the federal question is reserved, followed, finally, by a return to the federal court, is a ludicrous price, even if squandered in the interests of a balanced federalism.¹⁴⁶ At the very least, it has been suggested, such a federal plaintiff should be entitled after his state court journey to a consideration of whether, had he initially resorted to the

¹⁴³*E.g.*, Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1741-42 (1968).

¹⁴⁴See RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 1, 1973).

¹⁴⁵A curious question arises as to a criminal defendant who successfully petitions for habeas corpus and then seeks compensation in a section 1983 action. Will the state proceedings or the habeas proceedings determine issues which re-emerge?

¹⁴⁶*Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974).

federal court, he would have been rebuffed. If so, a lesser penalty, or none, ought to be attached to the results in the state forum.

An additional, although not so severe, dilemma is presented by the state plaintiff who fails to join a related federal cause because the latter is within the exclusive jurisdiction of the federal courts. Upon institution of the federal action, he is likely to be rebuffed.¹⁴⁷ It is this unwilling state litigant who has received the sympathy of commentators.¹⁴⁸ Thus, it has been suggested that, at the least, if the federal plaintiff has not chosen the state forum, but has by the very exigencies of the case or by procedural rules been forced to litigate aspects or all of his civil rights claim in a state court, traditional preclusion principles should not apply.

*Thistlethwaite v. City of New York*¹⁴⁹ affords an illustration of the central dilemma of the party forced to litigate in the state forum. Appellants had been convicted for distributing pamphlets in Central Park without permits. Their quest for a dismissal on the basis of the ordinance's invalidity was unsuccessful. Further review in the state court system was unavailing. Appellants did not seek Supreme Court review but filed a section 1983 action in the federal district court seeking declaratory and injunctive relief on the basis that the ordinance requiring a permit was facially unconstitutional and, when read in conjunction with the permit-dispensing provisions of related ordinances, was unconstitutional as applied. The Second Circuit Court of Appeals, over Judge Oakes' dissent, held that the appellants were precluded by the state proceedings from attacking the constitutionality of the ordinance under which they were convicted.¹⁵⁰

The existence of the 1983 claim, underlying which are values of unique federal import, prompted Judge Oakes, but not the majority, to take a more restrictive view of *res judicata* than might be appropriate in other cases. Judge Oakes' more intricate examination of the state proceedings noted the following problems. The attack in the state courts was upon the face of the

¹⁴⁷See *Kaufman v. Schoenberg*, 154 F. Supp. 64 (D. Del. 1954).

¹⁴⁸See, e.g., Averitt, *supra* note 88; Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185 (1974); Comment, *supra* note 141; 88 HARV. L. REV. 453 (1974).

¹⁴⁹497 F.2d 339 (2d Cir. 1974), *cert. denied*, 419 U.S. 1093 (1974), *noted in* 59 MINN. L. REV. 623 (1975), and 1974 WIS. L. REV. 1180.

¹⁵⁰Although the court held that appellants were precluded whether or not their litigation in state court was voluntary, the opinion suggests that the appellants' having insisted on forging ahead despite the prosecutor's willingness to forget the matter could be accounted as a choice to litigate in the state forum. The court also opined that habeas corpus was probably available to appellants—a view subject to some doubt.

ordinance, while the federal suit attacked the ordinance as applied and as part of the entire permit-dispensing system. The other ordinance added, at least as characterized by plaintiffs, additional infirmities. Furthermore, the federal suit properly could be characterized, at least in part, as seeking prospective relief in regard to future pamphleteering.

Of course, cases arise in which the state issue, for example, illegal search or seizure decided upon a motion to suppress, is more clearly identical with the federal quest: for example, a suit for damages for violation of the plaintiff's fourth amendment rights.¹⁵¹ In such a case, the res judicata question is purer: Ought civil rights actions be exceptions to section 1738, at least where the federal plaintiff was an involuntary state litigant?

As the exceptional treatment of res judicata in habeas corpus proceedings has been pinioned on specific defects in the state proceedings, so, if the special nature of civil rights actions are to prompt a milder preclusion, certain factors in the state proceedings may be defined as appropriate considerations in determining the effect as res judicata to be given the prior judgment. As has been described above, the posture of the federal plaintiff in state court seems pertinent; that is, the extent to which the state forum was chosen by the federal plaintiff ought to be considered. In addition, Professor McCormack has suggested the following elements as sufficient to dilute the usual preclusive effect commanded by section 1738: (1) a state court or agency had an institutional interest in the state decision; (2) the constitutional claim relates to the manner of state decision rather than aspects of the substantive dispute; (3) the issue at stake involves a question of the relationship between the individual and the state; (4) as in habeas corpus, the fact-finding process in the state forum was inadequate, presenting a special need for federal factfinding.¹⁵² In such circumstances, not only is the weighty interest represented by the constitutional dimensions of the claim tugging against preclusion, but certain of the values promoted by res judicata are of lesser moment than usual: for example, the relatively greater resources of the state as litigant considerably reduce the fear of harassment.

In *Brown v. Chastain*,¹⁵³ the parties had been divorced, custody of the child having been awarded to the mother. This custody decision was upset five years later at the father's behest. The mother, seeking to appeal her loss of custody but finding herself unable to afford a necessary transcript, petitioned the state courts that a

¹⁵¹ See, e.g., *Moran v. Mitchell*, 354 F. Supp. 86 (E.D. Va. 1973).

¹⁵² McCormack, *supra* note 85, at 276.

¹⁵³ 416 F.2d 1012 (5th Cir. 1969).

transcript be provided. Her petition, and an appeal therefrom having been denied, she claimed in a federal civil rights action that she had been denied equal protection. The Fifth Circuit Court of Appeals held her barred from relief, characterizing her quest in the federal district court as essentially a quest for review of a state court judgment, a power not granted to the lower federal courts.¹⁵⁴

Judge Rives dissented. He explained that plaintiff really was not seeking relief from a final order and it was doubtful whether the order was of such a sort as to permit review in the Supreme Court.¹⁵⁵ The issue was collateral to the main state proceedings, and, as it involved custody, seemed to Judge Rives to parallel habeas corpus even more closely than the usual section 1983 action.

Whether Judge Rives' analysis is correct or not, his willingness to analyze the propriety of applying a bar illustrates the type of analysis in which one convinced of the special nature of civil rights actions might engage. Other courts and judges similarly inspired have, at a minimum, sparingly applied preclusion principles, demanding, for example, strict mutuality and co-identity between issues.¹⁵⁶

On the other hand, a sensitive analysis of the state proceedings may reveal that, despite the civil rights nature of the action, application of the bar is quite appropriate. In *Mastracchio v. Ricci*,¹⁵⁷ the plaintiff, having been convicted of murder, brought a section 1983 action against certain police officers, contending that their perjury had convicted him. The circuit court felt the perjury issue must be deemed to have been encompassed in the affirmance of plaintiff's conviction unless the perjured testimony was not essential to the conviction, in which case the plaintiff could not show damages. In closing dictum, however, the court distinguished the case from one in which the civil rights suit raised a deprivation peripheral to the conviction, for example, invasions of privacy. The court hinted that in the latter instance, it would be less willing to regard such issues as subsumed by a guilty plea or conviction, even though technically they would be. So, too, in *Engelhardt v. Bell & Howell Co.*,¹⁵⁸ close analysis of the prior ac-

¹⁵⁴*Id.*

¹⁵⁵*Id.* at 1018-19 (Rives, J., dissenting).

¹⁵⁶*See, e.g.,* *G & M, Inc. v. Newbern*, 488 F.2d 742 (9th Cir. 1973); *Tang v. Appellate Div.*, 487 F.2d 138, 143 (2d Cir. 1973) (Oakes, J., dissenting), *cert. denied*, 416 U.S. 906 (1974); *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963); *Olson v. Board of Educ.*, 250 F. Supp. 1000 (E.D.N.Y. 1966); *Illinois Cent. R.R. v. Mississippi Pub. Serv. Comm'n*, 135 F. Supp. 304 (S.D. Miss. 1955).

¹⁵⁷498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).

¹⁵⁸327 F.2d 30 (8th Cir. 1964).

tions revealed a plaintiff who had instituted three previous state court actions based upon violation of state antitrust laws, each action having been removed to the federal court, where plaintiff failed to amend to raise the related federal claims which he now, in a fourth and federal action, contended should not be barred. Such a plaintiff hardly attracted the court's sympathy.¹⁵⁹

E. A Note on Full Faith and Credit

As noted above, there was a time when argument was made to the Supreme Court that full faith and credit requires only that judgments of sister states operate as evidence. The contention was rejected.¹⁶⁰ Ever since, it has been assumed that judgments must be given the same effect as they would be entitled to in the forum where rendered. This brocard has been considered as requiring the second forum not only to bar an attempt to relitigate the same claim, but also to accord binding effect to litigated components of the first judgment in subsequent, but different, suits. Thus if issue *A* is resolved in the first case, and the same issue re-emerges in a second case, a case different both in content and forum, it has generally been thought that the second forum is bound by the first forum's resolution of *A*. This is so by operation of the principles commonly called collateral estoppel.

While the rule that courts in a federation honor each other's judgments seems essential, a requirement that each fact determination made by one tribunal be honored by another seems less compelling—at least when the fact arises in a different context. The first requirement is a necessary binding—that the sovereign's final resolution of a dispute be respected; the second, while perhaps promoting the principles underlying *res judicata*—cessation of harassment and judicial economy—hardly seems to implicate the profounder values of union underlying full faith and credit.

The distinction to be made is between a case deciding the rights of parties, and an intermediate and somewhat conditional determination of a contested issue. The difference is to some extent illustrated by cases in which state courts have decided issues normally arising in cases of exclusive federal cognizance. For example, in *Becher v. Contoure Laboratories, Inc.*,¹⁶¹ the plaintiff, seeking to enjoin a state court action, contended that certain issues arising in the state court were typical components of a

¹⁵⁹See *id.* See also *Singer v. A. Hollander & Sons*, 202 F.2d 55 (3d Cir. 1953); *Kaufman v. Schoenberg*, 154 F. Supp. 64 (D. Del. 1954).

¹⁶⁰*Mills v. Duryee*, 11 U.S. (7 Cranch) 302 (1813).

¹⁶¹279 U.S. 388 (1929).

patent infringement action, a matter solely for the federal courts, and, therefore, ousted the state courts of competence. The Court rejected this contention:

That decrees validating or invalidating patents belong to Courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue.¹⁶²

That is, while patent cases are for the federal courts, aspects of patent cases may arise in and be decided by state courts. Moreover, if Judge Hand was right, the resolution of those federal issues, while binding for the limited purposes of the state case, should not bind the federal courts should the cause of action within exclusive federal jurisdiction present the same issues.¹⁶³

Cases such as *Becher* suggest a distinction between the "case," a peculiar combination or complex of issues, and the individual issues which may arise in a variety of contexts, a distinction paralleling that between a judgment and intermediate resolution of component facts. This parallelism suggests that while full faith and credit may demand a fairly strict observance of bar and merger, these demands dissipate where the preclusionary rule affects only issues, not claims—that is, what is commonly called collateral estoppel.

Distinguishing between a judgment and its component issues is especially significant when it is recognized that the federal civil rights plaintiff most frequently in a sympathetic position is the one whose state court involvement was involuntary—usually as a defendant, and, hence who will be precluded, if at all, by collateral estoppel, not bar or merger principles.

In its general application, full faith and credit is not a monolith. There is room for consideration of competing interests—of the forums and the parties. This seems especially true when the choice of law devolves upon the common law rather than the statutory law of the first forum.¹⁶⁴ This point is underscored by *Williams v. North Carolina*,¹⁶⁵ a case in which the Supreme Court permitted North Carolina to re-examine the question whether a

¹⁶²*Id.* at 391. See also *Pratt v. Paris Gas & Coke Co.*, 168 U.S. 255 (1897).

¹⁶³*Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 188-89 (2d Cir.), (Hand, J.), cert. denied, 350 U.S. 825 (1955). *Restatement of Judgments* section 71 agrees with the *Lyons* case.

¹⁶⁴See generally *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935); *Hood v. McGehee*, 237 U.S. 611 (1915); *Clarke v. Clarke*, 178 U.S. 186 (1900); Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROB. 706 (1963); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449 (1959).

¹⁶⁵325 U.S. 226 (1945).

defendant charged with bigamy had established domicile for divorce in Nevada despite the Nevada decree's finding of domicile. While in earlier related litigation,¹⁶⁶ the Court had held North Carolina bound to honor the Nevada decree, assuming the Nevada domicile, *Williams II*, recognizing significant North Carolina interests, and the fact that the state had not been a party to the Nevada divorce action, permitted the state to satisfy itself as to domicile. Again, we see implicit a distinction between the case and its components.

The recognition of the second forum's interest as overriding *res judicata* is not unlike that present in diversity cases, where a choice of law—state or federal—has to be made. If the federal interest is high, the federal rule will control.¹⁶⁷ In such cases, as well as in normal conflict of laws problems, a dichotomy, perhaps more conclusory than resolutionary, between procedural and substantive law is often recognized, the forum having greater leeway to apply its own procedural rules. Matters concerning the conduct of litigation, for example, are properly, if only roughly, called procedural. Collateral estoppel operates more nearly as a rule of evidence—precluding proof on an issue as having been already resolved. Unlike its interest if its judgments are to be disregarded, a state's interest in later issue estoppel is surely of lesser dimension. So long as a state's judgment is respected and entitled to enforcement, it is difficult to see why a state's claim to infallibility on each particular issue merits honor.¹⁶⁸

Thus, it appears that when issue and not claim preclusion is concerned, significantly different matters are at stake. The special federal interest in civil rights has been assumed. Playing against this is a state interest of somewhat lesser moment than is present when its judgments are threatened with dishonor. The extent of issue estoppel ought to be treated as is any other choice of law question.¹⁶⁹ Doing so will neither upset important values underlying full faith and credit nor cause undue affront to the state's interest.

IV. CONCLUSION

This Article was not designed to resolve the fundamental question as to whether civil rights actions should be exceptions

¹⁶⁶*Williams v. North Carolina*, 317 U.S. 287 (1942).

¹⁶⁷*See, e.g., Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942).

¹⁶⁸*See Carrington, Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381 (1963), for a similar contention, more fully explored.

¹⁶⁹A similar suggestion is made in Note, *Collateral Estoppel in Multistate Litigation*, 68 COLUM. L. REV. 1590 (1968).

to the requirements of *res judicata* as implemented by statutory full faith and credit. Rather, it is intended to portray inconsistency in the federal courts, to highlight the federal civil rights litigant's dilemma stemming from prior state litigation, and to call for some resolution of this pressing problem. The refusal of the Supreme Court to resolve the issue has bred a double inconsistency in lower courts: first, in the willingness or not to suspend normal *res judicata* principles in federal civil rights actions; second, in the failure of so many courts to acknowledge the critical role of full faith and credit as implemented by section 1738.

Of course, the mere recognition of the central role of full faith and credit does not determine the exact dimensions of *res judicata* in the second federal action. For it is clear that there are many situations in which competing interests have been deemed momentous enough to overcome the values promoted by preclusionary rules. There is, thus, ample precedent for creating exceptions to section 1738—whether the exception is to take the form of complete disregard of state adjudication, as is the case in matters of exclusive federal jurisdiction, components of which may turn up in a state forum, or the form of a softer *res judicata*, an extreme example of which is presented by habeas corpus.

Habeas corpus, of course, presents an attractive and apt analogy to civil rights actions. In habeas proceedings the values promoted by preclusionary principles have been frankly subordinated to the constitutional values at stake. Yet the Supreme Court's insistence on maintaining a distinction between habeas corpus and section 1983 actions suggests that the extreme, though not total, disregard of state litigation fashioned for habeas proceedings may not be acceptable in civil rights actions. Nevertheless, the special nature of the rights involved could call forth a special examination of the state litigation to ascertain the extent to which the federal plaintiff was forced into a tribunal not of his choosing and the extent to which that tribunal can be considered an adequate substitute for the federal forum he now seeks. The adequacy would depend not only on the state forum's competence, which is normally to be assumed, but the extent of state interest riding against plaintiff and the extent to which the environment in the state case was conducive to and inducive of a full-scale consideration of the federal claim. Upon such factors as these, the federal judge might fashion a custom-crafted set of preclusionary rules which account for the unique federal civil rights interest.

The special nature of federal civil rights actions and the special role of the federal courts in enforcement has been recognized and cannot be gainsaid. Therefore, at the least, a specially

flexible and sensitive application of *res judicata* may be called for—an application which examines closely the environment in the state court to make certain that the special federal interest is not ignored or given inadequate attention.

As it turns out, those situations in which the federal plaintiff is most apt to appear in a sympathetic light are those in which he appeared involuntarily in the state forum. In such a circumstance, the preclusionary principle apt to despoil the civil rights claim is one of collateral estoppel, not bar or merger. Neither the state's interest nor that of the federal union are affronted by granting less than preclusive effect to an intermediate fact determination. Such disregard has hardly the insult attached to simply disregarding a judgment of a state.

What have been portrayed, then, are a variety of circumstances in which related state litigation raises questions of *res judicata* in not at all abnormal federal civil rights actions. The federal plaintiff's need for guidance, if not sympathy, may vary with his posture in the state courts, but is potentially a problem whether he was a state plaintiff or defendant. Additional uncertainty stems from the increasingly subtle rules of abstention and federal equity.

Whatever may be the appropriate resolution of the issue, it ought to be resolved. This is particularly so as it concerns federal/state relationships of a sort in which the Supreme Court has recently claimed to have a special interest. Moreover, the Court's own recent contributions to abstention and federal equitable principles have made the question of the effect of state litigation even more pressing.