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State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit

BARBARA ANN ATWOOD*

Under the mandate of section 1738 of title 28 of the United States Code, state judicial proceedings must be given “the same full faith and credit” in the federal courts as they would receive in the courts of the rendering state. Although this statutory expression of intersystem comity has been a part of our law since shortly after the adoption of the Constitution, the statute frequently has been overlooked or disregarded by the federal courts when called upon to assess the preclusive effects of a prior state court determination or decree. The Supreme Court recently reaffirmed the vitality of section 1738 in a pair of decisions dealing with the res judicata effects of state court findings on later federal court litigation.

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2 The statute provides in part:

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.

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

3 See Act of May 26, 1790, ch. XI, 1 Stat. 122.

4 See infra notes 61-65 and accompanying text. The question of the preclusive effect of state court proceedings in later federal court litigation was not addressed in the original RESTATEMENT OF JUDGMENTS (1934). The American Law Institute finally adopted a provision on that question in the new Restatement. The RESTATEMENT (SECOND) OF JUDGMENTS § 86 (1982) provides:

A valid and final judgment of a state court has the same effects under the rules of res judicata in a subsequent action in a federal court that the judgment has by the law of the state in which the judgment was rendered, except that:

(1) An adjudication of a claim in a state court does not preclude litigation in a federal court of a related federal claim based on the same transaction if the federal claim arises under a scheme of federal remedies which contemplates that the federal claim may be asserted notwithstanding the adjudication in state court; and

(2) A determination of an issue by a state court does not preclude relitigation of that issue in federal court if according preclusive effect to the determination would be incompatible with a scheme of federal remedies which contemplates that the federal court may make an independent determination of the issue in question.

5 The term “res judicata” will be used in this article to denote both major doctrines of the law of prior adjudication: first, claim preclusion, or merger and bar, which refers to the effect of a judgment in extinguishing the underlying claim; and second, issue preclusion, or collateral estoppel, which refers to the effect of a prior determination of an issue in later litigation. See infra notes 18-34 and accompanying text. The newer terminology of “preclusion” has been adopted by the American Law Institute, RESTATEMENT (SECOND)
In *Allen v. McCurry* the Court held that a state court defendant who unsuccessfully raised a fourth amendment claim in the course of his criminal trial may be precluded from relitigating the constitutional issue in a later damages action in federal court under the 1871 Civil Rights Act. In *Kremer v. Chemical Construction Corp.*, the Court reached a similar conclusion with regard to Title VII of the 1964 Civil Rights Act. A complainant who unsuccessfully sought review in state court of an adverse administrative finding regarding an employment discrimination claim was precluded from thereafter seeking relief for the same conduct under Title VII in federal court. In each case the Court concluded that the pertinent civil rights statute did not override the federal court's obligation to accord full faith and credit to the state court proceeding.

The decisions in *Allen* and *Kremer* were the predictable products of a Court which has frequently displayed concern for the protection of state sovereignty against unwarranted federal interference. In each decision the Court emphasized that full recognition of state judicial proceedings by the federal courts was an essential component of federalism and comity. On the other hand, the decisions did not answer important questions relating to full faith and credit which directly implicate those same values of federalism. In particular, the Court has not yet defined the circumstances in which a party in federal court may be barred from litigating a claim which the party could have raised, but did not raise, in a prior proceeding.

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state court action. This question, to which the lower federal courts have given conflicting answers in the civil rights context, can be expected to arise with increasing frequency precisely because of the Allen and Kremer holdings. Currently, in light of Allen and Kremer, a litigant in a state court who wishes to obtain a full hearing in federal court on his or her federal claim may refrain from asserting the claim in the state court proceeding in order to avoid a later plea of res judicata, including possible issue preclusion. A defendant in a state criminal action or civil enforcement proceeding may be particularly likely to follow such a strategy if the state court is perceived as less sensitive to federal constitutional claims and the defendant is more concerned with obtaining a favorable decision of future rights than with avoiding punishment in the state prosecution.

Full faith and credit issues involving a previously unlitigated federal claim are likewise posed where successive actions, based on the same facts, are brought in state and federal court and where the federal action is founded on a statute within exclusive federal court jurisdiction. With

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11 As this article went to press, the Supreme Court decided Haring v. Prosise, 103 S. Ct. 2368 (1983), a case involving one of the full faith and credit issues addressed here. The Court's holding and reasoning are consistent with the conclusions of this article. In Haring the Court unanimously ruled that a state court criminal defendant who had entered a plea of guilty in the criminal proceeding was not barred by full faith and credit from later asserting a fourth amendment claim under § 1983 in federal court against the investigating officers. The Court reasoned that because the courts of the rendering state would not have precluded the fourth amendment claim under prevailing res judicata doctrine, "the issue was not foreclosed under 28 U.S.C. § 1738" in federal court. Id. at 2375. In addition, the Court refused to adopt a special rule of preclusion which would have barred the § 1983 claim merely because the claimant had had the opportunity to raise the issue in the criminal case. Id. at 2377. The Court rejected arguments that the failure to assert the fourth amendment objection should be deemed either an admission of the legality of the search or a waiver of the constitutional claim. The Fourth Circuit's opinion in the same case is discussed infra at text accompanying notes 164-67.

little real guidance from the Supreme Court, the lower courts have displayed confusion as to the impact of a grant of exclusive jurisdiction on the full faith and credit requirement. This article will explore these issues of state-to-federal preclusion, with major emphasis on the question of whether and to what extent a federal court may entertain a federal claim which could have been but was not actually litigated in a prior state court proceeding.

Part One of this article provides a brief summary of res judicata doctrine, a background discussion of full faith and credit, and a detailed review of the Allen and Kremer decisions. Part Two examines the various factual situations in which the question of the previously unlitigated federal claim can arise. The analysis in Part Two will focus on the practical scope of, and potential exceptions to, the full faith and credit mandate.

The thesis here is that the full faith and credit mandate should be applied consistently with its fundamental purpose— to ensure the conclusiveness and finality of state court proceedings in every court within our federal scheme. Accordingly, absent a statutory exception, the full faith and credit requirement does not permit the belated assertion of a federal claim in federal court where the object of the suit is to defeat an earlier state court judgment or to contradict an earlier state court determination. On the other hand, if finality and consistency are not threatened and traditional res judicata doctrines do not bar the assertion of a particular claim or issue, then the full faith and credit mandate should be deemed similarly inapplicable. Thus, so long as the object of the federal action is not to nullify the state court proceeding, neither res judicata

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14 See generally, 18 C. WRIGHT, A. MILLER & E. COOPER supra note 5, § 4470. Specific cases involving full faith and credit in the exclusive jurisdiction context are discussed infra at notes 203-32 and accompanying text.
15 This article is concerned with the federal courts' obligation to accord full faith and credit to a prior state court proceeding in the context of federal question jurisdiction, where there is a recognized federal interest in providing a federal forum for particular categories of claims. The article will not address the operation of full faith and credit in a subsequent federal action based on diversity of citizenship jurisdiction. Where the underlying claim in the federal action is founded on state law, federal substantive policy would not be implicated in the full faith and credit question. Federal law, nevertheless, would play a role in the diversity court: the prior judgment would have to satisfy minimal due process standards to be entitled to recognition, and, assuming that the constitutional standard is met, § 1738 would require the federal court to apply the res judicata law of the rendering jurisdiction. 28 U.S.C. § 1738 (1976). For an analysis of the choice of law considerations governing state-to-federal preclusion in a diversity context, see Degnan, Federalized Res Judicata, 85 YALE L.J. 741, 750-55 (1976); Vestal, Res Judicata / Preclusion by Judgment: The Law Applied in Federal Courts, 66 MICH. L. REV. 1723 (1968). For a particularly insightful judicial treatment of the issue, see J. Aron & Co. v. Service Transp. Co., 515 F. Supp. 428 (D. Md. 1981).
nor full faith and credit prevents a state court defendant from withholding a potential federal defense and then litigating it as an affirmative claim for relief in a later federal action.

A related thesis concerns the question of statutory exceptions to full faith and credit. It will be argued here that statutes which grant concurrent jurisdiction to state and federal courts cannot, by definition, create exceptions to the full faith and credit mandate. In such statutes, Congress has indicated that either forum is competent to reach a final resolution of the statutory claims. This fundamental premise of concurrent jurisdiction has been ignored by those courts which have recognized an automatic exception under section 1738 for civil rights claims which might have been but were not asserted in prior state court proceedings. Exclusive jurisdiction statutes, in contrast, should be presumed to establish a limited exception under section 1738 for claim preclusion. The finality of the state court judgment may at times be disturbed, but that relaxation of full faith and credit is required by Congress' edict that certain categories of claims be finally resolved only in the federal courts.

RES JUDICATA, FULL FAITH AND CREDIT, AND THE ALLEN AND KREMER DECISIONS

General Principles of Preclusion

Courts have developed the doctrines of res judicata in order to ensure the conclusive resolution of disputes within their jurisdiction. The basic principle of res judicata reflects a paradox: finality in judicial decisions is desirable not because courts are infallible but because they are fallible. The possibility that different courts will reach different conclusions on the same issue renders necessary a “convention of finality”; without such a convention, legal disputes would continue indefinitely in successive actions. By ensuring the finality of decisions, res judicata encourages reliance on adjudication, prevents repetitive and unnecessary

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See infra notes 182-85 and accompanying text.

See infra notes 186-93 and accompanying text.

Res judicata in federal and state courts is almost entirely a product of common law. Very few federal statutes prescribe the effect of particular judgments and none provides detailed rules on such matters as privity and mutuality. See generally 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 5, § 4403, at 19-21; A. VESTEL, RES JUDICATA/PRECLUSION 504 (1969).


Restatement (Second) of Judgments 10-11 (1982) (ch. 1); see also Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281, 315 (1957) (“the first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth”); cf. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).
litigation, and frees the courts to resolve other disputes. Individual applications of res judicata may not serve all of the identified purposes. It has been suggested that a plea of res judicata is at its weakest where the major purpose served is that of judicial economy, and at its strongest where it operates to protect the integrity of an earlier judgment. This argument has particular force in an intersystem context: the courts of one system have little interest in ensuring judicial economy in another system, but each system has a strong interest in reciprocal recognition of judgments.

Within the broad category of res judicata are contained the separate doctrines of issue preclusion and claim preclusion. The classic formulation of the distinction was provided by Justice Field:

[The judgment, if rendered upon the merits, . . . is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.]

Issue preclusion, or collateral estoppel, bars relitigation of issues which have been actually and necessarily determined in a prior proceeding, whether or not the same claim or cause of action is involved. The doctrine of claim preclusion, or merger and bar, on the other hand, prevents litigation of all grounds for, or defenses to, recovery on the same claim that was previously available to the parties, regardless of whether the

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23 Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1877).


25 The term "merger" is used to describe the effect of a judgment in a plaintiff's favor. The judgment is said to extinguish the entire claim and "merge" it in the judgment, thereby limiting the plaintiff's right regarding the claim to an action to enforce the judgment. "Bar" is used to describe the effect of a judgment for a defendant. Such a judgment is said to extinguish the entire claim, thereby precluding the plaintiff from again suing on the same claim. See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.3, at 533 (2d ed. 1977); RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19 (1982). Professor Martin has suggested that the distinction between merger and bar should not be based on whether the plaintiff or the defendant was the victor in the earlier proceeding. He proposes an alternative test based on the underlying justifications: merger occurs when a party should have presented a matter in the first action, and bar occurs when allowing a party to relitigate a matter might produce inconsistent results. Martin, The Restatement (Second) of Judgments: An Overview, 66 CORNELL L. REV. 404, 407 (1981).
claim or defense was asserted or determined in the prior proceeding. A related concept, variously referred to as “defendant preclusion” or the “common law compulsory counterclaim,” holds that a claim which could have been raised as a counterclaim in a prior action will be barred if the successful prosecution of the later action would nullify the initial judgment. In addition, the adoption of explicit compulsory counterclaim rules in many jurisdictions has correspondingly broadened the scope of claim preclusion. Generally, the failure to assert a statutory compulsory counterclaim is deemed to preclude the assertion of that claim in a later action. That principle of preclusion is typically treated by the courts as a component of res judicata.

The scope of claim preclusion is largely regulated through the definition of “claim” or “cause of action”; different jurisdictions have developed varying approaches. The determination of whether two actions are based on the same claim or cause of action is never simple but is particularly difficult in an intersystem context where the second court’s definition of “claim” may diverge markedly from that of the rendering court. Nevertheless, where the full faith and credit mandate applies, the second court must adhere to the rendering court’s law of res judicata and its definition of “claim.”

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20 See 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 5, § 4414.
22 RESTATEMENT (SECOND) OF JUDGMENTS § 22 (1982).
23 E.g., FED. R. CIV. P. 13(a); GA. CODE § 81A-113(a) (1978).
25 See, e.g., Texas Gulf Citrus & Cattle Co. v. Kelley, 591 F.2d 439 (5th Cir. 1979); Cleckner v. Republic Van & Storage Co., 556 F.2d 766 (5th Cir. 1977). The difference between treating compulsory counterclaim rules as part of res judicata and as simply a statutory directive may be significant in an intersystem context. If a court views another system’s compulsory counterclaim rule purely as a statutory directive serving primarily local interests of judicial economy, the court may not find the rule’s operation to be entitled to full faith and credit. See infra note 147.
26 The traditional formulation limited a claim or cause of action to the violation of a single right by a single wrong. Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927); see F. JAMES & G. HAZARD, supra note 25, at § 11.8; Schopflocher, What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?, 21 Or. L. Rev. 319 (1942). Other more pragmatic formulations look to a similarity of facts, issues, and evidence between the first and second actions. The new Restatement of Judgments has endorsed the “transactional” test, defining a claim to embrace all the remedial rights of the plaintiff against the defendant arising out of the relevant transaction. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). In a picturesque description of the standards for delimiting res judicata, Professor Cleary observed:

When we come to the second part of the rule [of res judicata], dealing with what might have been litigated in the former action, ... we leave the workaday world and enter into a wondrous realm of words, where results are obtained not by grubbing out facts but by the application of incantations which change pumpkins into coaches and one man’s property into another’s. The incantations are the various definitions of what constitutes a cause of action.

Cleary, supra note 22, at 343.
27 See infra note 54.
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The "might have been litigated" aspect of claim preclusion, upon which this article will focus, has been referred to by one court as the "[D]raconian formulation of the rule of res judicata." The issue can arise in various contexts. Where the federal court plaintiff was a plaintiff in state court in an action against the same party relating to the same incident, the plaintiff's failure to assert the federal claim in state court may preclude its later assertion in federal court under the doctrine of merger or bar. Similarly, the federal claim may be blocked where the federal court plaintiff was a defendant in state court and failed to assert a particular federal defense or counterclaim. Finally, the federal plaintiff may have been a state criminal defendant who withheld a particular federal defense in the criminal proceeding and then asserts the federal contention as a basis for affirmative relief in federal court. Each permutation implicates separate policies of res judicata and, concomitantly, full faith and credit.

Full Faith and Credit

Although the history of the adoption of the full faith and credit clause and implementing statute is sparse, it is apparent that the clause was included in the Constitution to further the sense of federation among the states. The primary purpose of the clause, insofar as it concerned judicial

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34 Winters v. Lavine, 574 F.2d 46, 56 (2d Cir. 1978).
35 U.S. Const., art. IV, § 1. "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Id.
36 The full faith and credit clause was mentioned only a few times in the constitutional debates and then without extended discussion. See 2 Records of the Federal Convention of 1787 135, 174, 188, 445, 447-48, 483-86, 487-89 (M. Farrand ed. 1966) [hereinafter cited as Records]. The implementing statute was passed without debate. See Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 153-55 (1949). As adopted in 1790, the Act required that a state judgment be accorded "such faith and credit" as it would have "by law or usage in the courts of the state" in which it was rendered. See Act of May 26, 1790, ch. XI, 1 Stat. 122. Congress reenacted the statute in 1804 and added a provision on authentication of judicial records. Act of March 27, 1804, ch. 56, 2 Stat. 298. The statute was not amended again until 1948 when Congress, among other changes, substituted the words "the same full faith and credit" for the original language of "such faith and credit." Act of June 25, 1948, ch. 464, 62 Stat 947. Apparently no substantive change was intended by the new phraseology. Casad, Intersystem Issue Preclusion and the Restatement (Second) of Judgments, 66 Cornell L. Rev. 510, 523 n.64 (1981); Vestal, supra note 15, at 1734 n.44. For a history of the full faith and credit clause and statute, see Costigan, The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of That Section and of Federal Legislation, 4 Colum. L. Rev. 470 (1904); Nadelmann, Full Faith and Credit to Judgments and Public Acts, 56 Mich. L. Rev. 33 (1957); Radin, The Authenticated Full Faith and Credit Clause: Its History, 39 Ill. L. Rev. 1 (1944).
37 Prior to the Continental Congress, a few colonies, in response to the problem of the fleeing judgment debtor, enacted legislation which provided for reciprocal recognition of judgments from the courts of other colonies. See Radin, supra note 36, at 17-18; Reese & Johnson, supra note 36, at 154. The colonists' experience led to the inclusion of a full
proceedings, was to ensure that a judgment in one state would be conclusive of the merits and therefore enforceable in all other states.\footnote{38} Section 1738,\footnote{39} unlike its originating clause in the Constitution, imposes the full faith and credit obligation on federal as well as state courts.\footnote{40} Indeed, the Supreme Court has stated that the specific purpose of the statute was “to insure that federal courts, not included within the constitutional provision, would be bound by state judgments.”\footnote{41} That the statute was enacted almost contemporaneously with the adoption of the Constitution suggests that the full faith and credit clause was understood by its framers to implicitly grant authority to Congress to prescribe the effect of state court judgments in federal court.\footnote{42} The statutory rather than constitutional nature of the full faith and credit obligation on the federal courts has two implications. First, the authority of the federal courts to recognize exceptions to, or modifications of, the statutory mandate is arguably broader than would be the corresponding authority under a constitutional mandate.\footnote{43} At the least, the federal courts cannot be held to more rigid standards under section 1738 than are the state courts under the dual regulation of the statute \textit{and} the Constitution.\footnote{44} Thus, the Supreme Court’s recognition of exceptions to full faith and credit in the state-to-state context\footnote{45} would seem
equally applicable to the state-to-federal context. Second, it is undisputed that Congress may legislatively override section 1738, although a congressional intent to do so will not be lightly inferred. In contrast, Congress' power to override the constitutional full faith and credit command is subject to question.

It has long been settled that the full faith and credit statute requires the federal courts to look to the res judicata law of the state of rendition to determine the effect of a state court judgment. In Mills v. Duryee, the first case in which the Supreme Court construed the statute, Frances Scott Key argued that the statutory reference to "faith and credit" referred only to the effect of a judgment record as evidence and did not require that the judgment be treated as conclusive of the underlying debt. The Supreme Court, in an opinion by Justice Story, rejected Key's contention and established the basic rule for full faith and credit to judgments:

The act declares that the record duly authenticated shall have such faith and credit as it has in the state Court from whence it is taken. If in such Court it has the faith and credit of . . . record evidence, it must have the same faith and credit in every other Court . . . . It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered.

. . . .

[We] can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision. Thus, the full faith and credit directive, by protecting the conclusiveness of judgments in an intersystem context, federalizes the doctrines of res judicata.

The statutory command of section 1738 has been construed to remedy in sister state; M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839) (state may apply its own statute of limitations to deny enforcement of sister state judgment that is still enforceable in rendering state). See generally Reese & Johnson, supra note 36.


Id. at 484-85. The Mills principle was described five years later by Chief Justice Marshall as requiring that a state court judgment be given "the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced." Hampton v. M'Connell, 16 U.S. (3 Wheat.) 234, 236-37 (1818). Accord M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 326 (1839).

incorporate both issue preclusion and claim preclusion. Although it has been suggested that issue preclusion may operate with less force than does claim preclusion under section 1738, the cases do not support such a distinction. Indeed, the bar against relitigation of determined issues implements the core values of res judicata and full faith and credit: finality and consistency of judicial determinations. Moreover, the drafters of the constitutional clause and the implementing statute required that full faith and credit be given to “judicial records and proceedings.” The choice of words arguably evinces a desire that judicial findings as well as decrees receive intersystem recognition. In any event, the decisions in Allen and Kremer establish that issue preclusion is a fundamental component of section 1738.

See cases cited in 18 C. Wright, A. Miller & E. Cooper, supra note 5, § 4469, at 669-72.

See Carrington, Collateral Estoppel and Foreign Judgments, 24 Ohio St. L.J. 381, 389 (1963); Torke, Res Judicata in Federal Civil Rights Actions Following State Litigation, 9 Ind. L. Rev. 543, 575 (1976); 18 C. Wright, A. Miller & E. Cooper, supra note 5, § 4467, at 641-44; cf. Williams v. Ocean Transp. Lines, 425 F.2d 1183, 1188-89 (3d Cir. 1970) (collateral estoppel, to extent it is designed primarily to prevent burdensome relitigation, may not rest on same policies as full faith and credit and therefore may not be binding in state-to-federal preclusion context); In re Transocean Tender Offer Sec. Litig., 427 F. Supp. 1211, 1219 (N.D. Ill. 1977) (federal court is not necessarily bound by rendering state’s interpretation of collateral estoppel).

See, e.g., Sutton v. Leib, 342 U.S. 402, 407 (1952) (intended function of full faith and credit is to avoid relitigation in other states of adjudicated issues).

There is some dispute over whether the federal courts under § 1738 may accord a greater preclusive effect to state court judgments than would the courts of the rendering state. See, e.g., Reimer v. Smith, 663 F.2d 1316, 1325-26 (5th Cir. 1981). The question turns on whether “the same full faith and credit” prescribes both a minimum and a maximum level of recognition due to foreign judgments. For example, if the rendering state follows the mutuality of estoppel rule, a federal court must determine whether it is bound to apply the state’s rule or whether it may apply the more liberal federal doctrine and allow issue preclusion to be asserted by one who was not a party to the earlier suit. The question can also arise in the context of claim preclusion. If the federal court’s definition of “claim” for purposes of merger and bar is broader than that followed by the state, the federal court may be inclined to apply the federal definition.

The issue has received considerable scholarly attention, primarily from an interstate perspective, and the commentators are not in agreement. See Casad, supra note 36, at 517-28 (due process rather than full faith and credit limits court’s power to give greater preclusive effect to foreign judgment than would the courts of the rendering state). See, e.g., Reimer v. Smith, 663 F.2d 1316, 1325-26 (5th Cir. 1981). The question turns on whether “the same full faith and credit” prescribes both a minimum and a maximum level of recognition due to foreign judgments. For example, if the rendering state follows the mutuality of estoppel rule, a federal court must determine whether it is bound to apply the state’s rule or whether it may apply the more liberal federal doctrine and allow issue preclusion to be asserted by one who was not a party to the earlier suit. The question can also arise in the context of claim preclusion. If the federal court’s definition of “claim” for purposes of merger and bar is broader than that followed by the state, the federal court may be inclined to apply the federal definition.

For both theoretical and practical reasons, the better approach would seem to be that the full faith and credit mandate prohibits a court from giving greater preclusive effect
The intersystem operation of claim preclusion, under the mandate of full faith and credit, was made clear in *American Surety Co. v. Baldwin.* The Court there invoked the full faith and credit statute to prevent a federal court from enjoining the enforcement of a state court judgment where the federal plaintiff had previously sought relief from judgment in state court. Justice Brandeis, writing for a unanimous Court, explained that the plaintiff could have invoked the federal remedy without first pursuing that provided by state procedures, but that once the plaintiff invoked the state remedy and pursued it to final judgment, the judgment was binding. Noting that the full faith and credit directive applied to state court proceedings drawn into question in an independent action in federal court, Justice Brandeis wrote:

Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the [plaintiff] cannot utilize the same issue as a basis for relief in the federal court. Federal claims are not to be prosecuted piecemeal in state and federal courts, whether the attempt to do so springs from a failure seasonably to adduce to a foreign judgment than the judgment would receive in the rendering state. Although Congress, in enacting § 1738, was clearly concerned with the problem of non-recognition of sister-state judgments rather than the possibility of "over-recognition," the chosen remedy by its terms reaches both situations. As has been recognized by the Court, the full faith and credit command implemented on a national level the common law doctrines governing recognition of foreign judgments. See *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 437-39 (1943). Those common law doctrines provided that the effect of the foreign judgment is determined by the law of the state where the judgment was rendered, and under the common law no greater effect could be given in the second court than that due the judgment under the law of the rendering court. See J. WELLS, *RE JUDICATA AND STARE DECISIS* 474 (1879); *RESTATEMENT OF CONFLICT OF LAWS* § 450 (1934). Hence, the full faith and credit requirement should be viewed as a codification of the common law rule which clearly prohibited a second court from giving any greater effect to a judgment than it would receive in the rendering forum. Moreover, if the rule were otherwise, difficult problems of due process and choice of law would enter into every case, since the parties may or may not have relied on the res judicata law of the rendering court in structuring their claims or defenses, and the second court may or may not have a sufficient interest in the controversy to apply its own law. See *Casad,* supra note 36, at 524-28. Such practical difficulties alone would seem reason enough to adhere to the literal command of § 1738. It will be assumed throughout this article that the full faith and credit requirement, where it applies, means that a federal court must give the same preclusive effect to state court proceedings as would the rendering court.

287 U.S. 156 (1932).

reasonable facts . . . or from a failure seasonably to pursue the appropriate remedy.\(^{25}\)

Under *American Surety*, traditional principles of claim preclusion apply in the state-to-federal context by the operation of the full faith and credit mandate. Ordinarily, such principles will bar a federal court plaintiff from challenging a state court judgment on grounds that could have been but were not asserted in the state court action.\(^{26}\) Indeed, Justice Brandeis' opinion makes clear that there is no general right to withhold a federal claim in state court in order to advance it in later federal litigation. It would seem, then, that the problem which is the focus of this article is partially resolved by reference to *American Surety* and cases like it.\(^{60}\) The case law, however, is replete with apparent contradictions of the principles of *Mills* and *American Surety*. In fact, the Supreme Court, prior to *Allen* and *Kremer*, frequently decided similar cases without ever mentioning full faith and credit.\(^{44}\) In many decisions the Court ignored altogether the preclusion doctrines of the rendering state and instead drew from a general federal common law of res judicata.\(^{52}\) Not surprisingly,
cases in the lower federal courts reflect the inconsistency in Supreme Court precedent. The courts have consequently failed to develop a coherent body of law governing the preclusive effects of state court judgments in general and the operation of the doctrine of claim preclusion in particular.

credit nor the res judicata law of the rendering state was mentioned in the opinion. Citing to federal precedent, the Court drew upon a federal common law of res judicata. The Court, for instance, looked to federal precedent to determine that the United States, though not a party to the prior proceeding "had a sufficient laboring oar" in the conduct of the state-court litigation to actuate principles of estoppel." Id. at 155. Similarly, the Court looked to federal law to ascertain "whether the particular circumstances of this case justify an exception to general principles of estoppel." Id. at 182. Two assumptions seem to underly Justice Marshall's opinion for the Court: first, that the preclusive effects of a prior state court judgment in a later federal court action are determined according to federal common law, and, second, that a federal court in a state-to-federal preclusion context retains substantial discretion to modify, or reject altogether, traditional preclusion doctrine. Both assumptions were implicitly rejected in Allen and Kremer.

The subject of statutory exceptions to full faith and credit was in a similar state of ambiguity prior to *Allen* and *Kremer*. The subject received little direct attention from the pre-*Allen* Court: the exceptions that were recognized were not discussed as full faith and credit problems at all but as questions of res judicata. The Court’s rather casual fashioning of exceptions to common law res judicata doctrine contrasts sharply with the exacting standard later formulated in *Allen* and *Kremer* for recognizing an intended repeal of section 1738.

The well-established exception for federal habeas corpus proceedings was first recognized in *Brown v. Allen.* Without addressing any issue of full faith and credit, the Court held that a state court rejection of a state prisoner’s constitutional claim was not conclusive on the federal habeas corpus claim in the federal district court. Justice Frankfurter explained that if the state court decision were to be accorded ordinary res judicata effect, the federal court’s intended role under the statute would be defeated. “[T]he prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which Congress by the Act of 1857, provided it should not have.”

Although the validity of the Court’s statutory construction in *Brown* may be questioned, the habeas statute was later amended to define explicitly the preclusive effect of state court factual determinations. In its present version, section 2254 unmistakably evinces an express congressional modification of section 1738. Thus, although the *Brown* decision offers sparse guidance in recognizing exceptions to full faith and credit, there can be little doubt that section 2254 is such an exception.

Exceptions to full faith and credit have also been suggested by cases in the bankruptcy area, most notably in *Brown v. Felsen*, where the


* Brown, 344 U.S. 443 (1953).

* Id. at 500.


* Under 28 U.S.C. § 2254(d) (1976) a state court determination on the merits of a factual issue will be “presumed correct” unless the petitioner establishes the existence of one of eight specified deficiencies in the state court proceedings. For an illustration of the interpretive difficulties posed by the statute, see Sumner v. Mata, 449 U.S. 539 (1981) (Sumner I); Sumner v. Mata, 102 S. Ct. 1303 (1982) (per curiam) (Sumner II).

* In Kalb v. Feuerstein, 308 U.S. 433 (1940), for example, the Court permitted a mortgagor who had filed a petition in bankruptcy to collaterally attack a state court judgment confirming a foreclosure sale. By operation of law, the filing of the bankruptcy action automatically deprived the state court of jurisdiction over the foreclosure proceedings. Frazier-Lemke Act, ch. 792, 49 Stat. 942 (1935). The Court framed the inquiry in terms of general principles of preclusion rather than full faith and credit. While recognizing that ordinarily the state court judgment would be entitled to a presumption of regularity the Court stated that Congress, through specific bankruptcy legislation, had created an exception to that
Court addressed the effect of a prior state court judgment on a dischargeability proceeding brought under section 17 of the former Bankruptcy Act. In that case a state court collection suit had ended in a stipulated settlement, the terms of which included a judgment in favor of the guarantor against the debtor. The settlement did not indicate the nature of the claim underlying the debtor's liability to the guarantor. The debtor subsequently petitioned for bankruptcy, and the guarantor contended in the bankruptcy court that the debt owed to him was the product of fraud and therefore came within the non-dischargeability provisions of section 17. The debtor, on the other hand, argued that there had been no finding of fraud or deceit in the prior state court proceeding and that res judicata therefore barred relitigation of the nature of the debt.

The Supreme Court held that the guarantor's right to assert the non-dischargeability of the debt was not precluded by res judicata. Invoking a general doctrine of preclusion instead of the full faith and credit mandate or the res judicata law of the rendering state, Justice Blackmun reasoned that the statutory policy in favor of resolving section 17 questions in bankruptcy court would be undermined by a rigid application of preclusion doctrine. The Court, did not undertake a searching review of the legislative history of the Act to ascertain whether Congress in-
tended to override traditional res judicata principles, but instead relied on "[s]ome indication that Congress intended the fullest possible inquiry aris[ing] from the history of section 17."”

Significantly, the Brown Court viewed the “might have been litigated” component of claim preclusion as a source of potential inequity to be applied with caution through a weighing of competing interests. Justice Blackmun observed: “Because res judicata may govern grounds and defenses not previously litigated . . . it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry.”” In contrast, the Court pointed out that the narrower doctrine of issue preclusion might very well apply “[i]f in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of section 17, then [issue preclusion], in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court.””

The court’s analysis in Brown indicates that issue preclusion and claim preclusion must be distinguished as separate factors in assessing the impact of a federal statute on a state-to-federal preclusion question. Although the Brown Court did not employ a full faith and credit analysis, the distinction between claim preclusion and issue preclusion is equally valid whether the focus is on a statutory repeal of full faith and credit or a statutory relaxation of the rules of res judicata. In either analytical
context, the distinction recognizes that a given statutory scheme may affect one doctrine of preclusion while leaving another fully operative.\(^{50}\)

**The Decisions**

In *Allen* and *Kremer* the Supreme Court reaffirmed the primacy of the full faith and credit statute in state-to-federal preclusion questions and, concomitantly, narrowed the scope of federal court authority to fashion exceptions to the statutory mandate. Since these two decisions jointly suggest a fairly complete analytical theory of full faith and credit and res judicata in the intersystem context, they will be examined in detail.

**Allen v. McCurry**

McCurry was convicted in a Missouri state court for possession of heroin and assault with intent to kill. Before trial, McCurry moved unsuccessfully to suppress evidence discovered during a warrantless search of his house at the time of his arrest.\(^{61}\) While McCurry’s appeal from his conviction was pending, he filed a *pro se* damages action in federal court under section 1983.\(^{62}\) McCurry alleged a conspiracy to violate his fourth amendment rights, an unconstitutional search of his house, and an assault following his arrest.\(^{63}\)

In granting summary judgment for the defendants, the district court found that the only issue in McCurry’s lawsuit—whether the police lawfully entered and searched McCurry’s house—was litigated on the

\(^{50}\) The Supreme Court’s failure to articulate a coherent theory of statutory exceptions to full faith and credit is reflected in the lower court decisions. In general, the courts have recognized exceptions on the basis of “countervailing and compelling federal policies” underlying various federal statutory schemes. Red Fox v. Red Fox, 564 F.2d 361, 365 n.3 (9th Cir. 1977) (policy behind Indian Civil Rights Act may outweigh, under certain circumstances, the principle of full faith and credit). See also Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975) (policy of Title VII of 1964 Civil Rights Act does not permit application of collateral estoppel based on adverse state court finding); American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040 (1972) (“well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738”). See generally 18 C. Wright, A. Miller & E. Cooper, supra note 5, \S 4469.

\(^{61}\) The fourth amendment claim is discussed on the merits in State v. McCurry, 587 S.W. 2d 337 (Mo. App. 1970). The trial judge admitted evidence which had been within plain view when seized, but excluded certain articles of contraband which had been found in dresser drawers and hidden in auto tires on a porch.

\(^{62}\) 42 U.S.C. \S 1983 (1976) provides:

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

merits at his criminal trial and determined adversely to his position. On appeal the Eighth Circuit focused on an issue not addressed by the district court: whether issue preclusion should bar relitigation of a fourth amendment claim where, in light of Stone v. Powell, federal habeas corpus was unavailable as a means of obtaining a federal forum. The circuit court concluded that because of "the special role of federal courts in protecting civil rights" and the conceded unavailability of habeas corpus relief, the federal court had a duty "to consider fully, unencumbered by the doctrine of collateral estoppel, [McCurry's] section 1983 claims."

The Supreme Court reversed in a six-three decision. Justice Stewart’s majority opinion began with an emphasis on the federalism policies served by the doctrines of preclusion in a state-to-federal context. "[R]es judicata and collateral estoppel," he said "not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." Moreover, sensitivity to the concerns of federalism, Justice Stewart pointed out, was not a matter of discretion since, in the full faith and credit statute, "Congress has specifically required all federal

44 Id. The court noted that issue preclusion rather than claim preclusion applied since the civil suit involved different parties from those in the criminal action. Accordingly, the court barred relitigation of only the issues which were actually litigated in the first action. The district court apparently overlooked McCurry’s assault claim, which clearly had not been determined in the criminal trial. That oversight provided one ground for the Eighth Circuit’s subsequent reversal. McCurry v. Allen, 606 F.2d 795, 797 (8th Cir. 1979), rev’d, 449 U.S. 90 (1980). For the subsequent history of McCurry’s continuing efforts to recover for the alleged assault, see McCurry v. Allen, 688 F.2d 581 (8th Cir. 1982).
45 428 U.S. 465, 494 (1976). In Stone the Court held that a state prisoner could no longer assert a fourth amendment claim in a petition for federal habeas corpus relief if the prisoner had been afforded a full and fair opportunity to raise the claim in state court.
46 Allen, 606 F.2d at 799.
48 Allen v. McCurry, 449 U.S. 90, 95-96 (1980). Justice Stewart’s opinion recognized “one general limitation” on the operation of collateral estoppel—that the doctrine “cannot apply when the party against whom the earlier decision is asserted did not have a ‘full and fair opportunity’ to litigate [the] issue in the earlier case.” Id. at 95. In a footnote the court cautioned that other considerations may require an exception to the normal rules of preclusion in particular cases and denied the dissenters’ suggestion that a “full and fair opportunity to litigate” was intended to be the single determinative factor. Id. at n.7. The Court’s disclaimer was implicitly undercut by the Kremer decision. See infra notes 126-28 and accompanying text.
courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so . . . .”

In reversing the Eighth Circuit, the Court was required to reach two separate conclusions: first, that the normal rules of preclusion, including the mandate of section 1738, are fully applicable to federal actions under the civil rights statute, and, second, that the decision in Stone v. Powell did not require a relaxation of the ordinary doctrines of full faith and credit and collateral estoppel. An examination of the language of section 1983 revealed nothing to the majority which “remotely expresses any congressional intent to contravene the common law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738.” In reviewing the legislative history of section 1983, the Court recognized that the strong motive behind the enactment of the statute was congressional concern that the state courts had been deficient in protecting federal rights. Nevertheless, the Court concluded that, in the context of the legislative history as a whole, such congressional concern “len[t] only the most equivocal support” to the argument that Congress had intended to override section 1738 or the common law preclusion doctrines. Although Congress had concededly altered the balance of power between the state and federal courts in enacting section 1983, the result was an addition to the jurisdiction of the federal courts and not a subtraction from that of the state courts. Justice Stewart observed that “since repeals by implication are disfavored, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.”

The Court further explained that Stone, the narrow basis of the Eighth

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69 Id. at 96. The language of the quoted passage, by failing to reveal the exact role of state law in determining the preclusive effect of a state court judgment, is artfully vague. It is unclear, under the quoted statement, whether state law governs all aspects of preclusion. The uncertainty was removed, in part, by Kremer.


71 Allen, 449 U.S. at 97-98.

72 Id. at 99.

73 Id. (citations omitted). Justice Stewart drew on descriptive references to § 1983 in Monroe v. Pape, 365 U.S. 167 (1961), to show that the Court’s prior interpretations of the statute did not necessarily imply that Congress had intended to allow relitigation of federal issues “simply because the state court’s decision may have been erroneous.” 449 U.S. at 101. In Monroe Justice Douglas writing for the Court had explained that the 42d Congress found the new federal remedy to be necessary because of three perceived problems in the state courts: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-74. Justice Stewart’s opinion interpreted the Monroe language to mean that an exception to normal preclusion principles might be justified in the face of inadequate state procedures or “where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim.” 449 U.S. at 101. In a passage which presaged the Kremer holding, the Court explained that such an exception would be “essentially the same” as the general limitation on the preclusion doctrine—the
Circuit’s holding in *Allen*, had concerned the “prudent exercise of federal court jurisdiction” under the habeas corpus statutes and that the decision did not bear on section 1983 or the preclusion doctrines. In addition, the Court rejected the broader principle underlying the court of appeals’ holding—“that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises.” The Court found no authority for such a proposition in the Constitution or in section 1983. The Court observed, moreover, that a general distrust of the capacity of the state courts to render correct decisions on constitutional issues is wholly inconsistent with the established principle, reaffirmed in *Stone* itself, that the state courts are constitutionally obliged and presumptively able to uphold federal law.

In dissent, Justice Blackmun disputed the Court’s conclusion that Congress intended the federal courts to give full preclusive effect to prior state adjudications in section 1983 cases. Justice Blackmun found such a supposition “senseless” in light of Congress’ obvious aim to correct the wrongs perpetuated by the state authorities, including state courts. In addition, the dissenters, disagreeing with the majority’s interpretation of

requirement that the party against whom a bar is asserted have had a full and fair opportunity to litigate the claim or issue decided by the first court. *Id.*

The *Allen* Court’s interpretation of *Monroe* may be faulted for taking Justice Douglas’ language out of context. In *Monroe* Justice Douglas enumerated the three circumstances of state court inadequacy as reasons for the enactment of the Civil Rights Act, not as criteria governing the availability of a federal forum. Justice Stewart, however, in an attempt to reconcile the *Allen* holding with precedent, used the *Monroe* language as an indication of when a civil rights action might be brought. *Allen*, 449 U.S. at 103.

The majority excluded from its holding the question whether a § 1983 claimant can litigate in federal court an issue which might have been but was not raised in a prior state court proceeding. *Id.* at 94 n.5, 97 n.10. Indeed, the petitioners in *Allen* expressly assumed that the “might have been litigated” aspect of claim preclusion would be inapplicable to a federal civil rights claim. Petition for certiorari cited *supra* note 12.

The dissenters’ failure to focus on the mandate of § 1738 weakens their position. The intended effect of a statute on pre-existing common law is a different inquiry from the intended effect of a subsequent statute on an earlier one. Successive statutes will be construed to be consistent with one another whenever possible, and the presumption is against an implied repeal of the earlier law. Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976). In contrast, when Congress addresses a matter previously governed by federal common law, the presumption is that Congress intended to displace the common law. City of Milwaukee v. Illinois, 451 U.S. 304 (1981). By referring to the maxim that repeals by implication are disfavored, the *Allen* majority buttressed its conclusion that § 1983 was not intended to work a partial repeal of § 1738. The dissent in treating the question as one of the effect of a statute on the common law, rather than the effect of a statute on a statute, thereby implicitly lowered the threshold showing required to establish the requisite congressional intent.
precedent, argued that cases such as *Monroe v. Pape* and *Mitchum v. Foster* established the federal courts as the primary and final arbiters of constitutional rights.\(^{100}\)

Kremer v. Chemical Construction Co.

Kremer, a Jew, filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964.\(^{91}\) He contended that his termination from employment with Chemical Construction Company ("Chemico") and the failure to rehire him were the result of religious and national-origin discrimination.\(^{102}\) Pursuant to 42 U.S.C. section 2000e-5(c), the EEOC referred the complaint to the New York State Division of Human Rights (NYHRD).\(^{103}\) After an investigation, the NYHRD found no probable cause to believe that Chemico had engaged in the discriminatory practice charged,\(^{104}\) and on appeal to the NYHRD's Appeal Board, affirmed the agency's determination.\(^{105}\) Kremer then filed, pro se, a petition with the Appellate Division of the New York

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\(^{91}\) 365 U.S. 167 (1961).

\(^{92}\) 407 U.S. 225 (1972).

\(^{100}\) The dissenters suggested that the Court's decision was inconsistent with the reservation doctrine of *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964). *Under England* a federal plaintiff who is required by the abstention doctrine to submit his constitutional claim first to a state court may return to the federal court for a new determination of the constitutional claim so long as the litigant makes an explicit reservation to that effect in state court. The *Allen* dissenters relied on broad language from *England*, which endorsed the right of a litigant who has properly invoked the jurisdiction of a federal court to have his constitutional claims decided by that court.

The majority rightly rejected the suggestion that *England* was applicable. See Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HAST. L.J. 1337, 1368-70 (1980); Currie, *supra* note 68, at 331-32. *England* was an effort by the Supreme Court to ameliorate the harsh results of the abstention doctrine and to ensure that abstention operated as a postponement rather than an abdication of the exercise of federal jurisdiction. Furthermore, the *England* Court recognized that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forego his right to return to the District Court." 375 U.S. at 419. The *Allen* facts, of course, did not involve an initial resort to federal court followed by a judicial order of abstention. Rather, the federal court in *Allen* did not get the case until after the state criminal trial had ended and the state court had determined McCurry's federal constitutional claim. Since McCurry had not properly invoked federal court jurisdiction in the first instance, *England*'s reservation doctrine was simply inapposite. *England* would seem similarly unavailable as a means of overcoming the operation of claim preclusion in a state-to-federal context. The *England* procedural device is confined to a reservation of constitutional claims when a federal court abstains; it is not a means generally available for starving off the effect of res judicata. See, e.g., Burgess v. Mitchell Motors, Inc., 449 F. Supp. 588, 589 (N.D. Ga. 1978), rev'd on other grounds, 615 F.2d 361 (5th Cir. 1980).


\(^{104}\) Id. at 470.

\(^{105}\) Id.
State Supreme Court to set aside the adverse administrative determination. That court unanimously affirmed the decision of the Appeal Board and no further appeal was taken.\footnote{Kremer v. State Div. on Human Rights, 402 N.Y.S.2d 699 (App. Div. 1978).}

After the conclusion of the state court proceedings, the EEOC determined that there was no reasonable cause to believe that Kremer's claims were valid and issued a notice of right to sue.\footnote{See Kremer v. Chemical Constr. Corp., 464 F. Supp. 468, 470 (S.D.N.Y. 1978).} Kremer then instituted a civil action in district court. On Chemico's motion, the district court dismissed the complaint on res judicata grounds because of the prior state court determination.\footnote{Id.} The Second Circuit affirmed.\footnote{Id.}

The Supreme Court, in a five-to-four decision, affirmed the Second Circuit.\footnote{Id.} Writing for the majority, Justice White framed the issue before the Court as "whether Congress intended Title VII to supercede [sic] the principles of comity and repose embodied in § 1738."\footnote{Kremer v. Chemical Constr. Corp., 623 F.2d 786 (2d Cir. 1980).} Justice White thus made clear from the outset that the presumptive applicability of section 1738 would be the focus of the inquiry.

Under New York law, the judgment of the appeals court affirming the adverse administrative determination precluded Kremer from bringing any other action based upon the same grievance in the New York courts.\footnote{Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982).}
Section 1738, if applicable, would bind the federal court to the same doctrine of preclusion and would bar Kremer from relitigating the same question in federal court. Kremer advanced two principal arguments for avoiding the operation of section 1738: first, that Congress, in enacting Title VII, intended to relieve federal courts of the statutory obligation to give full faith and credit to state court decisions; second, that even if section 1738 applied the New York administrative and judicial proceedings were not entitled to preclusive effect in federal court because the issues in the state and federal proceedings were different, and because the hearing and review in the state forum were procedurally inadequate.

In responding to the first argument, Justice White emphasized that "an exception to section 1738 will not be recognized unless a later statute contains an express or implied partial repeal."3 Invoking traditional principles of statutory construction,114 the Court found that neither the language nor operation of Title VII revealed a clear incompatibility between Title VII and section 1738.115 Justice White wrote that while Title VII and been construed to guarantee a trial de novo following state and federal administrative proceedings, "neither the statute nor our decisions indicate that the final judgment of a state court is subject to redetermination at such a trial."

Likewise, section 706(b) of Title VII,116 which requires the EEOC to give "substantial weight" to findings made in state proceedings, was construed is problematic. The rule of claim preclusion requires that the prior court have had jurisdiction to entertain the claim. See Restatement (Second) of Judgments § 25 comment e (1982). Thus, in order for the doctrine of claim preclusion to be technically applicable, the New York court would have to have had jurisdiction to hear Kremer's Title VII claim. The Supreme Court, however, has not decided whether Title VII claims are within the exclusive jurisdiction of the federal courts, see Kremer, 102 S. Ct. at 1896 n.20, and there is a conflict on the issue among the lower courts. See Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1083 (8th Cir.), cert. denied, 446 U.S. 966 (1980) (recognizing conflict but finding it unnecessary to decide jurisdictional issue); Dickinson v. Chrysler Corp., 456 F. Supp. 43 (E.D. Mich. 1978) (holding jurisdiction to be exclusive); Bennun v. Board of Governors, 413 F. Supp. 1274 (D.N.J. 1976) (holding jurisdiction to be concurrent).

The Court additionally suggested that the "might have been litigated" aspect of claim preclusion would be available to prevent Kremer from arguing in federal court that his national origin discrimination claim differed significantly from his religious discrimination claim. 102 S. Ct. at 1899 n.4. Although Kremer did not make such an argument and the Court's suggestion was thus purely dicta, the suggestion has been seized upon by at least one lower court to support the holding that claim preclusion applies generally to civil rights actions. Lee v. City of Peoria, 685 F.2d 196, 198-99 (7th Cir. 1982).

113 Kremer, 102 S. Ct. at 1890.
114 As in Allen, the Court emphasized that successive statutes should be construed consistently whenever possible and that repeals by implication are not favored. The Court went on to identify the two well-settled categories of repeals by implication—where provisions in the two statutes are in irreconcilable conflict, and where a later statute "covers the whole subject" of the earlier one and is unambiguously intended as a substitute. Kremer, 102 S. Ct. at 1890.
115 Kremer, 102 S. Ct. at 1890-91.
116 Id. at 1891 (emphasis in original).
to indicate only the minimum level of deference the EEOC must give to all state determinations. The "substantial weight" provision, Justice White stated, "does not bar affording the greater preclusive effect which may be required by section 1738 if judicial action is involved." Finally, the majority found nothing in the legislative history of Title VII to suggest that Congress intended to provide an absolute right to relitigate in federal court an issue resolved by a state court; Congress had not intended to supplant state employment discrimination laws or to disturb the traditional operation of res judicata. As in Allen, the mere fact that Congress was aware of the existing inadequacies in some state's fair employment procedures did not mean that Congress intended for all state judicial determinations to be disregarded.

Kremer's second line of argument constituted the true focus of disagreement among members of the Court. The four dissenters apparently would concede that a full trial in state court on the merits of an employment discrimination claim should bar subsequent federal court proceedings. The real dispute among the Justices was whether the more limited state court proceeding involved in Kremer should result in preclusion. The ma-

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118 Kremer, 102 S. Ct. at 1891. In a somewhat inconsistent vein, the majority noted that federal review of discrimination charges would be pointless if the federal agency or court were bound by state agency decisions. Id. at n.7. Hence, the court implicitly recognized that the "substantial weight" standard did constitute a maximum level of deference for at least some purposes.

Justice Blackmun, writing for himself and Justices Brennan and Marshall in dissent, criticized the majority's "schizophrenic reading" of § 706(b). Id. at 1901. The majority, in Justice Blackmun's view, read the provision to mean that state administrative proceedings do not preclude a trial de novo in federal court but that a limited state court review affirming those same administrative findings does have such a preclusive effect. The dissenters argued that such a position was unsupportable since, in accordance with New York law, the state court decided only whether the state agency decision was arbitrary or capricious and did not decide the merits of Kremer's discrimination claim. Thus, in effect, the Court was giving preclusive effect to state agency proceedings contrary to the congressional intent of Title VII. Id. Justice Stevens, also dissenting, agreed that the New York court's review of the administrative proceedings was not on the merits of Kremer's discrimination claim and that "Congress intended the claimant to have at least one opportunity to prove his case in a de novo trial in court." Id. at 1912.

119 Id. at 1893-94. The Court did not cite to any legislative discussion of §1738 or, indeed, to any indication in the debates that members of Congress were aware of the existence and operation of the statute. The task of divining legislative intent is particularly fanciful when the question is the intended effect of one statute on an earlier one and where Congress may not even have been cognizant of the earlier statute. In the face of the ambiguous legislative history, most lower courts concluded prior to Kremer that in enacting Title VII Congress intended to override the ordinary operation of res judicata and full faith and credit. See cases cited supra note 110.

120 The Court seemed particularly impressed with isolated statements from the congressional debates suggesting that Congress believed ordinary principles of res judicata would operate in Title VII cases. See Kremer, 102 S. Ct. at 1893-94. The problem is that such statements, as pointed out by the dissent, uniformly addressed the issue of successive federal court proceedings rather than state and federal proceedings. See id. at 1906-07 (Blackmun, J., dissenting).

121 Id. at 1904 n.10 (Blackmun, J., dissenting). 1911 (Stevens, J., dissenting).
majority quickly disposed of the contention that the issues in each action were sufficiently different to avoid a bar of the Title VII lawsuit. Justice White found the elements of a successful employment discrimination claim under New York law and federal law to be "virtually identical." He concluded that when the New York court affirmed the NYHRD's dismissal, it "necessarily decided that petitioner's claim under New York law was meritless, and thus it also decided that a Title VII claim arising from the same events would be equally meritless." Justice White expressly rejected the dissenters' suggestion that the New York court's determination was not a ruling on the merits of Kremer's claim.

The majority then turned to "the more serious contention" that the state administrative and judicial proceedings were so fundamentally flawed as to place them outside the operation of section 1738. Kremer argued that the NYHRD's investigation of his complaint had been minimal, that the New York court proceeding had been a narrow review of administrative action, and that he had not yet enjoyed a full hearing on the merits of his claim of discrimination. Justice White's response clarified a point that had been in contention among the Justices in Allen.

Noting that the proper test was whether Kremer had been offered a full and fair opportunity to litigate the claim or issue in the prior proceeding, Justice White went on to explain the meaning of that test:

Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of section 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full-faith-and-credit guaranteed by federal law.

Applying that standard to the state proceedings available to Kremer, the Court easily concluded that New York's system of administrative investigation, appeal, and judicial review was sufficient under the due

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122 Id. at 1896.
123 Id.
124 Id. at 1896 n.21. Although the majority's view of the scope of the New York court proceeding may be disputed, see id. at 1903 (Blackmun, J., dissenting), 1911 (Stevens, J., dissenting). Justice White's opinion should be interpreted on its own terms and not more broadly than its author intended. To the majority, the case involved preclusion of a claim or issue actually determined on the merits in a prior state court proceeding.
125 Id. at 1897.
127 Kremer, 102 S. Ct. at 1897. As the Court explained, the minimal due process test is consistent with the directive of § 1738: a state court proceeding which fails to satisfy due process standards gives rise to a constitutionally infirm judgment which is not entitled to recognition in any court, whether in the rendering state or elsewhere. Thus, "other state and federal courts would still be providing a state court judgment with the 'same' preclusive effect as the courts of the state from which the judgment emerged." Id. at 1898.
process clause. Thus, having already established that Title VII did not override section 1738 and that New York law would bar Kremer from bringing any further court action in a New York state court on his discrimination claim, the court held that Kremer was likewise barred from pursuing his Title VII claim in federal court.

*Kremer*, like *Allen*, illustrates that adherence to preclusion doctrines in the state-to-federal context serves the principle of comity as well as the traditional res judicata goals of judicial economy, finality, and repose. The Court made clear that in giving effect to a prior state court judgment, a federal court's duty to accept the rules of preclusion chosen by the rendering state is not merely a matter of wise policy but is instead a congressional mandate. *Kremer* likewise mirrored *Allen* in its pronouncement of a stringent standard for establishing express or implied exceptions to section 1738. In the face of strong arguments to the contrary, the Court in each case concluded that Congress had left intact the state courts' power to render a binding determination.

Perhaps the most significant contribution of *Kremer* was its explanation of the “full and fair opportunity to litigate” standard under section 1738. The standard was first developed as a safeguard for the application of collateral estoppel, primarily in cases involving nonmutuality of estoppel. In such cases, the “full and fair opportunity to litigate” standard required the court to consider a variety of factors, including whether the party to be estopped had an incentive to fully litigate the issue in the first suit and whether there were significant differences in available procedures between the first and second action. Although *Allen* alluded several times to the “full and fair opportunity to litigate” standard, it did not define it. In *Kremer*, however, the Court revealed that the stand-

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128 The dissenting Justices argued that the minimal due process standard announced by the Court was contrary to the legislative intent of Title VII. "In Title VII, Congress wanted to assure discrimination victims more than bare due process; it wanted them to have the benefit of a vigorous effort to eliminate discrimination." *Id.* at 1906 (Blackmun, J., dissenting). The dissenters' position essentially was that a federal court should not bar a Title VII action on the grounds of res judicata unless the prior state court proceedings were the substantive and procedural equivalent of what the complainant would have received in a federal forum. The same position is advanced in Jackson, Matheson & Piskorski, *supra* note 110, at 1517-20.


131 One commentator argued, after *Allen* but before *Kremer*, that the full and fair opportunity to litigate ensures a free choice of forum, and that a federal court need not adhere to a state's preclusion rules if the rules require a would-be federal litigant to raise all defenses, including federal defenses, in the state court. *The Supreme Court, 1980 Term*, 95 Harv. L. Rev. 91, 287-88 (1981). The suggestion seems to be that a "full and fair opportunity to litigate" means an opportunity to litigate in federal court, at least for a
ard was much more narrow in the context of state-to-federal preclusion than in an intrasystem context. Where section 1738 applies, a federal court need only inquire whether the state court proceeding satisfied the minimum procedural requirements of due process.\textsuperscript{132}

Although \textit{Kremer} should be viewed as a case involving issue preclusion, Justice White’s discussion of the due process standard indicates that the same standard governs questions of both issue preclusion and claim preclusion under section 1738.\textsuperscript{133} The standard presumably would require a court to assess the fairness of the procedures available to a litigant in state court even though the litigant chose not to take advantage of them.\textsuperscript{134} If such available procedures met minimum due process requirements, then the state’s rules of claim preclusion would be binding under section 1738. Such a conclusion, however, does not mean that the federal court would be barred from considering other factors which might persuade a litigant to withhold a federal claim in state court. Although it is less than clear on the point, \textit{Kremer} should not be read to prohibit the federal courts from invoking the rendering state’s own exceptions to the application of res judicata.\textsuperscript{135} In short, once it is determined that the state court action provided basic procedural fairness to the litigant, then the federal court is compelled by section 1738 to give effect to the state judgment according to the state’s law of res judicata. The law of res judicata, of course, includes not only the rules of preclusion but also the exceptions to those rules.\textsuperscript{136}

\textsuperscript{132} The \textit{Allen} Court expressly noted that the “full and fair opportunity to litigate” standard was not the sole determinant in deciding whether to apply ordinary rules of collateral estoppel. \textit{Allen}, 449 U.S. at 95 n.7.

\textsuperscript{133} One implication of \textit{Kremer} is that preclusion in an intersystem context, where the full faith and credit statute applies, is a less flexible doctrine than preclusion in an

\textsuperscript{134} The articulation of the standard as an “opportunity to litigate” should not be viewed as an expansion of the traditional doctrine of collateral estoppel. It has been argued that under an “opportunity to litigate” standard issue preclusion should turn not on whether the party actually litigated the issue but on whether the party had the incentive and opportunity to do so. Vestal, The Restatement (Second) of Judgments: \textit{A Modest Dissent}, 66 \textit{CORNELL L. REV.} 464, 468-69 (1981). Professor Vestal's position is that where there is an incentive to litigate an issue, the failure to do so constitutes an admission. Professor Vestal would thus reject the traditional requirement of collateral estoppel that the issue to be precluded must have been actually litigated. Professor Hazard, who was Reporter for the Second Restatement, succinctly points out the difficulty with that approach: “Professor Vestal’s ‘opportunity’ theory allows the court to infer that the issue was important to a party whose behavior indicates he thought the issue was unimportant, and, having done that, to convict the party by his silence.” Hazard, \textit{Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems}, 66 \textit{CORNELL L. REV.} 564, 584 (1981).

\textsuperscript{135} See \textit{Kremer}, 102 S. Ct. at 1899 (“The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy.”).
APPLICATION AND SCOPE OF ALLEN AND KREMER

The full faith and credit statute, as interpreted in *Allen* and *Kremer*, would seem to provide a ready answer to all questions of state-to-federal preclusion, including the question of the previously unlitigated federal claim: as in other situations, the claim should be allowed or disallowed according to the applicable state rules of preclusion. Nevertheless, there is a substantial body of case law holding that the federal courts under certain circumstances should bar, as a matter of federal law, only those claims which were actually litigated in a prior state court proceeding. The decisions are not in agreement as to the rationale for such a rule or the circumstances when such a rule should be followed; in addition several theories of varying validity emerge from the case law. The theories principally contend either that the particular rule of preclusion is not within the scope of section 1738 or that the particular claim is a statutory exception to section 1738.

Scope of Section 1738

One reason for distinguishing the "might have been litigated" aspect...
of claim preclusion from other preclusion doctrine goes to the underlying purpose of the full faith and credit obligation. As discussed earlier, section 1738 renders res judicata doctrines operative on a national level. The Supreme Court has long recognized that the intended function of the full faith and credit clause was to avoid "relitigation in other states of adjudicated issues, while leaving to the law of the forum state the application of the predetermined facts to the new problem." Similarly, the policies of preclusion are at their strongest when a party seeks to relitigate claims or issues that have been actually determined in an earlier proceeding. It can therefore be argued that the policies of preclusion and the full faith and credit directive are satisfied by giving full recognition to actual judicial determinations; but where an issue which could have been raised defensively in a prior action was neither asserted nor determined, there is no pertinent judgment record to which to give conclusive effect.

The argument has an appealing logic but must be applied with due regard for the policies underlying section 1738. Where the federal claim belatedly asserted in federal court would nullify or impair rights established by the prior state court judgment, then full faith and credit principles are fully applicable. In such a case, the conclusiveness of the

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140 See supra notes 35-54 and accompanying text.
142 In United States v. Munsingwear, 340 U.S. 36, 39 (1950), the Court described the following passage as the "classic statement of the rule of res judicata":
[A] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

(footnote continuing)
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143 See supra notes 35-54 and accompanying text.
prior judgment is at stake, and the section 1738 policies of consistency, finality, and federal-to-state comity are implicated. A typical illustration involves a litigant who, after unsuccessfully defending a state civil enforcement proceeding on state law grounds, brings a federal action challenging the underlying state statute or its application on federal constitutional grounds. In Castorr v. Brundage, for example, plaintiffs brought a federal action challenging the state's termination of their parental rights. In the termination proceeding in state court, the parents had defended purely on state law grounds. They subsequently sought in federal court a declaration of the unconstitutionality of the termination statutes and an award of custody of their child. The Sixth Circuit, aptly characterizing the federal lawsuit as a "collateral attack" upon the state court judgment, held that res judicata was a bar regardless of the

constitutes a federal interest sufficient to justify a departure from § 1738, thereby freeing the federal courts to give a greater preclusive effect to state court judgments than would the courts in the rendering state. Id. Thus, the federal courts may invoke a "uniform federal law of preclusion in cases that varying state laws may not foreclose." Id. at 324. It is doubtful, however, that the implied exclusivity of § 1257 satisfies the stringent standard enunciated in Allen and Kremer for showing a partial repeal of the full faith and credit statute.

According to one commentator, the Rooker doctrine and the principles of claim preclusion are identical in scope, and the Rooker doctrine rather than res judicata or full faith and credit requires dismissal of a federal action which is based on the same claim as a prior state court proceeding. See Chang, supra note 100. Professor Chang contends that because the Rooker doctrine applies, the defect in the federal proceedings is jurisdictional and therefore non-waivable. Professor Chang's argument notwithstanding, the preferable approach to state-to-federal preclusion would seem to be that of full faith and credit. Under Rooker, the inquiry ought to be whether the federal action is in substance an appeal from a prior state court judgment. The ordinary concept of an appeal, however, does not fit the facts of many state-to-federal preclusion questions. For example, where a state court litigant seeks some form of federal relief that does not include a nullification of the state court judgment, Rooker is inapplicable. Nevertheless, the full faith and credit mandate may be implicated if the federal action is deemed to involve the same claim as the state court proceeding. Professor Chang seeks to avoid this problem by uniquely defining "appeal" as "any claim that could not be brought as an original action because it is barred by a previous judgment." Chang, supra note 100, at 1354. Such a definition ignores the Rooker Court's evident understanding of an "appeal" as an action to reverse or modify an earlier judgment. See Rooker, 263 U.S. at 416. Another problem with the proposal for an expansive use of Rooker is the absolutist nature of jurisdictional defects. Judge-made exceptions to jurisdictional doctrines are theoretically unavailable while, on the other hand, the courts have carved out various exceptions to res judicata. See RESTATEMENT (SECOND) OF JUDGMENTS § 26, 28 (1982). In the sensitive and changing area of state-to-federal preclusion, the trend should be away from the rigid formalism of Rooker.

A contrary approach was suggested in Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d 135 (3d Cir. 1981) (en banc) (plurality opinion), aff'd, 102 S. Ct. 2341 (1982). In the sensitive and changing area of state-to-federal preclusion, the trend should be away from the rigid formalism of Rooker.
plaintiffs' failure to litigate the federal challenge in state court. The holding in Castorr was correct because it prevented the plaintiffs from using a federal action to abrogate an adverse decision in state court. Allowing the plaintiffs to raise their federal claim in a subsequent action would have directly undermined the policies of section 1738; invocation of full faith and credit was therefore appropriate.

Similarly, a state's procedural rules, such as a compulsory counterclaim rule, may operate to bar the litigant from asserting the belated federal claim in state or federal court. Such a procedural rule should be viewed as within the mandate of section 1738 since it is part of the state's law of res judicata. In Southern Jam, Inc. v. Robinson, county officials had obtained an injunction in state court barring a scheduled rock concert. In the injunction proceeding, the concert promoters had defended on equal protection grounds but had not asserted a first amendment defense. Three years later, the promoters sued for damages in federal court alleging that their first amendment freedoms had been violated by the state court injunction. The court of appeals held that the federal action was barred under section 1738 on the basis of the state's compulsory counterclaim rule.

The result in Southern Jam was clearly correct but could have been...
reached without reliance on the rendering state's procedural rule. If the object of the federal claim is to defeat the initial judgment, the core full-faith-and-credit value of ensuring conclusiveness of judgments is directly implicated so that the mandate of section 1738 is fully applicable. In *Southern Jam* the first amendment contention could have been raised as a defense in the state court proceeding; the failure to raise it there should preclude a later collateral attack even if the attack is disguised in the form of damages. The rendering state's law of res judicata, in addition to the compulsory counterclaim rule, would ordinarily compel such a result.\(^{151}\)

Under certain circumstances involving successive state and federal actions, on the other hand, the full faith and credit mandate will not apply. Where the belated federal claim would not destroy or undermine the prior judgment but would impose an independent liability on the adverse party, then neither full faith and credit principles nor the doctrines of preclusion are called forth. For example, state criminal defendants after *Allen* are faced with a choice of raising their fourth amendment defenses in state court and thereby risking a final adverse determination in that forum, or withholding such defenses for later assertion in federal court and thereby incurring a heightened risk of conviction.\(^{152}\) For reasons of strategy, the second alternative in this "Hobson's choice"\(^{153}\) may be the more appealing one in some situations. For instance, the defendant may accept a reduced punishment in exchange for a plea of guilty but still wish to bring a civil suit for an antecedent constitutional violation.\(^{154}\) In such a case, the federal action would not be an attempt to nullify the state criminal conviction but instead would represent an effort by the defendant to secure a determination on issues collateral to, and unresolved by, the earlier judgment.\(^{155}\) Hence, the federal action would not seem to implicate the policies of res judicata or full faith and credit.

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\(^{151}\) In other contexts the Supreme Court has recognized that damages actions which challenge state official conduct may be as intrusive as injunctive actions. In *Fair Assessment in Real Estate v. McNary*, 102 S. Ct. 177, 184 (1981), for example, the Court observed that the determination necessary for a damages award in a § 1983 challenge to a state taxing scheme "would be fully as intrusive as the equitable actions that are barred by principles of comity."

\(^{152}\) See Fernandez v. Trias Monge, 586 F.2d 848, 855 (1st Cir. 1978).


\(^{155}\) The hypothesized suit for damages would comport with the view that fourth amendment violations are better remedied through civil redress than through application of the exclusionary rule. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421-23 (1971) (Burger, C.J., dissenting); cf. *Stone v. Powell*, 428 U.S. 465 (1976) (fourth amendment violation does not impugn integrity of fact-finding process and should not be basis for federal habeas corpus relief where defendant had opportunity to litigate issue in state court).
The widespread disagreement over the preclusive effect of a prior state criminal conviction on unlitigated issues has intensified in the wake of Allen. The lower court decisions reveal an especial confusion on the question of applicable law. In most pre-Allen decisions which addressed questions of preclusion following a state criminal conviction, the courts assumed that the question was governed by federal law and did not mention the potential applicability of section 1738. Several courts, for example, devised the rule that a federal action following a state court conviction is barred if the federal suit calls into question the elements of the crime or the constitutionality of the conviction. Such a rule is typically based on the rationale that habeas corpus is the sole federal remedy available when the claim, although styled as a request for damages, would undermine the integrity of the state court conviction. That rationale rests on the federal court's power to enforce statutory restrictions on federal remedies and does not depend on the rendering state's res judicata law.

In addition, the courts have sometimes applied a theory of estoppel, presumably arising under federal law, to bar the assertion of issues not previously litigated in a prior criminal proceeding. The question arises most typically in the context of a prior guilty plea. The theory, which

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157 See, e.g., Fulford v. Kline, 529 F.2d 377 (5th Cir. 1976), adhered to on reh'g en banc, 550 F.2d 342 (5th Cir. 1977); Brazell v. Adams, 493 F.2d 489 (5th Cir. 1974); Metros v. United States, 441 F.2d 313 (10th Cir. 1971); Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969).
158 See, e.g., Courtney v. Reeves, 635 F.2d 326 (5th Cir. 1981); Brazell v. Adams, 493 F.2d 489 (5th Cir. 1974); Metros v. United States Dist. Ct., 441 F.2d 313 (10th Cir. 1971); Hooper v. Guthrie, 390 F. Supp. 1327 (W.D. Pa. 1975). But see Fernandez v. Trias Monge, 586 F.2d 848 (1st Cir. 1978) (because of high value placed on individual liberty, state criminal defendant should not be barred from raising constitutional claims not previously litigated in criminal proceeding).
159 The Fifth Circuit has provided the most explicit articulation of such a rationale. See Fulford v. Kline, 529 F.2d 377 (5th Cir. 1976), adhered to on reh'g en banc, 550 F.2d 342 (1977) (federal action which alleged prosecution had withheld exculpatory evidence at trial was barred as going to constitutionality of conviction); Meadows v. Evans, 529 F.2d 385 (5th Cir. 1976), adhered to en banc, 550 F.2d 345 (1977). That rationale rests on the federal court's power to enforce statutory restrictions on federal remedies and does not depend on the rendering state's res judicata law.
160 The Fifth Circuit has provided the most explicit articulation of such a rationale. See Fulford v. Kline, 529 F.2d 377 (5th Cir. 1976), adhered to en banc, 550 F.2d 342 (1977) (federal action which alleged prosecution had withheld exculpatory evidence at trial was barred as going to constitutionality of conviction); Meadows v. Evans, 529 F.2d 385 (5th Cir. 1976), adhered to en banc, 550 F.2d 345, cert. denied, 434 U.S. 969 (1977). Accord Delaney v. Giarrusso, 633 F.2d 1126 (5th Cir. 1981). Apart from the question of appropriate remedy, the Fifth Circuit has noted in a post-Allen decision that collateral estoppel has no application where a state criminal defendant has not actually litigated a particular issue. In Richardson v. Fleming, 651 F.2d 366, 374 (1981), the court observed that collateral estoppel does not apply to a situation "where, although certain illegal or unconstitutional acts against a criminal defendant may have occurred, the defendant has chosen not to place those acts in issue in the trial of his case."
161 See, e.g., Hooper v. Guthrie, 390 F. Supp. 1327 (W.D. Pa. 1975). Similarly, in Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969), the court treated the defendant's failure to raise a fourth amendment objection in a state criminal trial as tantamount to a waiver and gave the waiver preclusive effect in a later federal civil rights action. Such a theory of waiver, which presupposes full incentive to raise the issue in the criminal action, has been questioned. See Whitley v. Seibel, 676 F.2d 245 (7th Cir. 1982); cf. supra note 133.
should be viewed as an estoppel against inconsistent positions\textsuperscript{161} rather than an expanded version of collateral estoppel or issue preclusion,\textsuperscript{162} holds that the defendant’s plea is an admission not only of the elements of the crime but also of the legality of the state’s conduct. Such a theory is akin to a federal common law of evidence,\textsuperscript{163} and, again, does not rely on the rendering state’s law of res judicata.

Allen’s emphasis on section 1738 has created new but unnecessary confusion over applicable law. Some courts have assumed that the full faith and credit mandate of section 1738 controls the question of preclusion of unlitigated issues following a state criminal conviction but have misapplied the statute. In \textit{Prosise v. Haring},\textsuperscript{164} for example, a state court defendant who had been convicted of a drug offense after a guilty plea sought damages in a later federal action on the basis of an alleged fourth amendment violation.\textsuperscript{165} Assuming section 1738 to apply, the Fourth Circuit initially looked to state law to determine the preclusive effect of the guilty plea. Although the court found no case on point in the courts of the rendering state, it noted a general reluctance in those courts to apply preclusion after a criminal action. The Fourth Circuit therefore formulated “a flat rule of non-preclusion” with respect to search and seizure issues in guilty plea cases.\textsuperscript{166} The court seemed to be announcing a rule of general applicability for future federal cases arising in that circuit. Such a rule would presuppose authority to fashion a federal law of preclusion without regard to section 1738. On the other hand, the court reiterated that its general rule “is conformable under 28 U.S.C. § 1738 to Virginia decisions”\textsuperscript{167} and thus implied that the rule may have applicability only in federal cases relating to prior guilty pleas in the Virginia courts. Hence,

\textsuperscript{161} See 1B J. Moore & T. Curnier, \textit{supra} note 61, ¶ 0.405[8], at 771 (distinguishing estoppel against inconsistent positions from res judicata and suggesting that former is governed by federal standards when federal issues are involved).

\textsuperscript{162} See Vestal, \textit{supra} note 133, at 478-83, where the argument for such a view of collateral estoppel is advanced. Professor Vestal contends that unlitigated issues, such as potential fourth amendment defenses in guilty plea cases, should be precluded if there was an opportunity and a sufficient incentive to litigate the issues in the criminal proceeding. In so urging, Professor Vestal departs from established principles of preclusion. See Restatement (Second) of Judgments § 85 (1982).

\textsuperscript{163} See Hazard, \textit{supra} note 133, at 578; Restatement (Second) of Judgments § 85 comment b (1982) (“A defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts representing the elements of the offense. However, under the terms of this Restatement such an estoppel is not a matter of issue preclusion, because the issue has not actually been litigated, but is a matter of the law of evidence beyond the scope of this Restatement.”).

\textsuperscript{164} 667 F.2d 1133 (4th Cir. 1981), aff’d, 103 S. Ct. 2368 (1983).

\textsuperscript{165} Id. at 1135.

\textsuperscript{166} Id. at 1142.

\textsuperscript{167} Id. The Supreme Court’s affirmance did not address the validity of the Fourth Circuit’s “flat rule of non-preclusion.” Rather, the Court affirmed the narrow holding that because the fourth amendment claim would not be barred under the res judicata law of Virginia, it was likewise not barred in federal court under § 1738. See \textit{supra} note 11.
the court’s own discussion reveals a confusion regarding the applicability and operation of section 1738.

A similar ambivalence can be seen in *Ford v. Burke,* where a state court defendant, following a conviction on a guilty plea, filed a damages action in federal court challenging the constitutionality of his arrest. The court noted at the outset that “[t]he operation of 28 U.S.C. § 1738 assures that this Court accord proper deference to the state court’s findings.” Then, reading *Allen* broadly, the court reasoned that the defendant’s claim should be disallowed since he had been afforded a full and fair opportunity to litigate the fourth amendment issue in the state court. At no point, however, did the court actually look to the relevant state law of preclusion; rather, the court assumed an authority to formulate an approach independent of that which might be followed in the state system.

Under the circumstances of *Prosise* and *Ford,* section 1738 provides no basis for precluding the constitutional claim in federal court. The traditional doctrines of issue preclusion, claim preclusion, and concomitantly full faith and credit, have no application in the situation under discussion. Issue preclusion bars litigation only of issues which have been actually litigated and necessarily determined in the earlier proceeding. In contested criminal actions, *Allen* makes clear that litigated issues may be held binding against the defendant, but where the defendant has chosen not to assert a particular defense, issue preclusion by definition is inapplicable.

Moreover, where a state court defendant, following conviction, seeks to recover in federal court for an antecedent constitutional violation, the damages action should not be barred by claim preclusion. So long as the civil action does not include a request to set aside the judgment of conviction, the civil remedy and the criminal prosecution are not the same “claim”: the criminal defendant could not have asserted a claim for damages in the criminal prosecution, and the parties in the two actions would be different. The defendant’s failure to raise the collateral issue defensively means only that the issue may not be asserted as a ground for challenging the conviction.

Another situation involving a prior state criminal proceeding which

159 529 F. Supp. 373 (N.D.N.Y. 1982).
160 Id. at 375.
161 Id. at 376.
162 Id. at 377-79.
163 See Restatement (Second) of Judgments § 27 (1982).
164 See Richardson v. Fleming, 651 F.2d 366, 374 (5th Cir. 1981), discussed at supra note 159.
165 See Restatement (Second) of Judgments § 85 comment a (1982); cf. Boykins v. Ambridge Area School Dist., 621 F.2d 75 (3d Cir. 1980) (where state forum could not have awarded damages, federal civil rights claim is different cause of action and res judicata is no bar).
frequently arises in the federal courts is likewise outside the scope of section 1738. A state court defendant wishing to protect his or her right to engage in future conduct may seek a declaratory judgment in federal court on the constitutionality of the criminal statute under which the defendant has already been convicted.\\(^{175}\) If the defendant requests a declaration of invalidity with prospective effect only, the prior judgment of conviction will not be disturbed or undermined.\\(^{176}\) In such a circumstance, traditional claim preclusion has no application since each violation or threatened violation of the statute would constitute a separate claim.\\(^{177}\) Similarly, issue preclusion would be inapplicable so long as the defendant had not actually litigated the constitutionality of the statute in state court.\\(^{178}\) Section 1738 requires that the judgment of conviction be accorded conclusive effect on the question of the defendant's guilt, but the hypothesized judgment would not have addressed the constitutionality of the criminal statute. The federal court could therefore


\[\text{\textsuperscript{176} The Supreme Court recognized as much in Wooley v. Maynard, 430 U.S. 705, 711 (1977), where it held the doctrine of Younger v. Harris, 401 U.S. 37 (1971), to be inapplicable to a federal action which sought only prospective relief and which was "in no way 'designed to annul the results of a state trial.'" The Court stressed that the Maynards sought only to be free from prosecutions for future violations of the same statute. Professor Currie has argued that res judicata should have barred the Maynard's federal action since that action "dealt with future instances of conduct identical to conduct whose legality had been litigated in state court." Currie, supra note 68, at 341. He goes on to urge a radical restructuring of the law of preclusion.}\\]

\[\text{\textsuperscript{177} Perhaps the time has come to abandon the unhelpful distinction between res judicata and "collateral estoppel" and to ask simply whether the party to be precluded had adequate opportunity to litigate the matter in the earlier proceeding and whether the matter is closely enough related to the original controversy so that judicial economy would be served by confining litigation to one proceeding.}\\]

\[\text{\textsuperscript{178} Id. at 342 (citations omitted). Professor Currie's suggestion, by placing overriding emphasis on judicial economy, arguably distorts the core function of res judicata of ensuring the finality of judicial determinations. There would seem to be no threat to finality by allowing a state criminal defendant to withhold a claim of unconstitutionality, accept a judgment of conviction, and then urge the criminal statute's invalidity in a separate federal action solely for the purpose of protecting future conduct.}\\]

\[\text{\textsuperscript{177} Cf. Commissioner v. Sunnen, 333 U.S. 591, 598 (1948) (every tax year constitutes separate cause of action).}\\]

\[\text{\textsuperscript{178} Even where the issue was actually litigated, the circumstances may make the application of preclusion particularly harsh. In Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093 (1974), the defendants were convicted of distributing leaflets in a city park without a permit and paid a fine of ten dollars. In the course of the prosecution the state court ruled that the permit system was constitutional. In a later civil rights action for prospective declaratory relief, the defendants were precluded from relitigating the question of the ordinance's constitutionality. Preclusion in such a circumstance is required under § 1738 if the courts of the rendering state would likewise hold the defendants to be bound. Often, however, the res judicata law of the rendering state will recognize certain pertinent exceptions to the doctrine of issue preclusion which may serve to avoid the Thistlethwaite result. See Restatement (Second) of Judgments § 28 (1982).}\\]
resolve the constitutionality issue in a separate proceeding without doing violence to the dictate of full faith and credit.\textsuperscript{179}

It is submitted, then, that the full faith and credit mandate does not control the question of whether a federal court litigant may assert issues which could have been but were not raised in a prior state criminal proceeding. Acceptance of that proposition, however, does not mean that the federal courts must open their doors to all such litigants. To the contrary, the federal courts remain free to formulate and apply their own law of estoppel, evidentiary presumptions, and remedies with due regard for the policy of intersystem comity. A sense of deference toward the state criminal proceeding may persuade some federal courts to disallow belated civil claims based on antecedent constitutional violations;\textsuperscript{180} others may place greater value on the complainant’s need for a forum for civil redress.\textsuperscript{181} Alternatively, an emphasis on judicial economy may lead the courts to bar even prospective challenges to state statutes where the challenge could have been raised earlier. The point here is that the federal courts are not acting under the compulsion of section 1738 in such circumstances, but are instead applying their own law according to independent federal policies.

\textbf{Statutory Exceptions}

The teaching of \textit{Allen} and \textit{Kremer} is that the federal courts should not infer a statutory exception to section 1738 unless Congress has clearly manifested its intent to depart from the full faith and credit mandate.\textsuperscript{182} The specific holdings in each case illustrate the heavy burden on a litigant wishing to escape the preclusive effect of a prior state court determination. Persuasive arguments were available that Congress had intended to ensure a litigant’s access to federal court under section 1983 and Title


\textsuperscript{180} \textit{E.g.}, Ford v. Burke, 529 F. Supp. 373 (N.D.N.Y. 1982); Palma v. Powers, 295 F. Supp. 924, 935-36 (N.D. Ill. 1969). Of course, the doctrine of \textit{Younger v. Harris}, 401 U.S. 37 (1971), may bar access to the federal forum if the state litigant seeks federal relief before the conclusion of the state court proceedings, even if such relief is only declaratory. See \textit{Samuels v. Mackell}, 401 U.S. 66 (1971). Moreover, some lower courts have invoked the \textit{Younger} doctrine to bar damage claims arising out of a pending criminal prosecution. See, \textit{e.g.}, \textit{Martin v. Merola}, 532 F.2d 191 (2d Cir. 1976).

\textsuperscript{181} In \textit{Fernandez v. Trias Monge}, 586 F.2d 848, 855 (1st Cir. 1978), for example, the court reasoned:

\begin{quote}
[T]o bar all claims that might have been raised in a criminal trial forces the criminal defendant to the uncomfortable choice between, on the one hand, possibly alienating the trial judge, particularly when the judge’s own procedures are questioned, and delaying trial, and, on the other, foregoing his constitutional claim.
\end{quote}

VII, but in *Allen* and *Kremer* the Court found that clearer evidence of legislative intent would be required to recognize a partial repeal of section 1738. The underlying theme of the Court's discussion in each case was that Congress, in enacting the pertinent statutory scheme, had not deprived the state courts of their concurrent jurisdiction to hear and determine the relevant issues. Conversely, in the two contexts in which the Supreme Court has recognized exceptions to full faith and credit—habeas corpus and bankruptcy—the federal courts assume a unique role, exclusive of the states, under the applicable statutes.

It would seem, then, that where Congress has not disturbed the residual power of the state courts to hear a particular claim or issue, the rendering state's law of res judicata should determine whether the state court judgment should be binding in a later federal court action. The critical inquiry in assessing the validity of an alleged statutory exception to section 1738 is whether concurrent jurisdiction exists on the particular question. If jurisdiction in the state court remains, that jurisdiction means power to render a binding determination.

Section 1983

Section 1983 is within the concurrent jurisdiction of the federal and state courts and therefore is presumptively controlled by the ordinary operation of full faith and credit. A number of federal courts have nevertheless recognized a limited section 1983 exception to full faith and credit by permitting federal court litigants to assert constitutional claims which could have been but were not actually litigated in a prior state court action. Some courts, endorsing a choice-of-forum theory, have distinguished between voluntary and involuntary state court litigants and have recognized a claim preclusion exception only for litigants who were defendants in the earlier state court action. The rationale for the section

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133 Kremer, 102 S. Ct. at 1894 ("It is sufficiently clear that Congress ... though wary of assuming the adequacy of state employment discrimination remedies, did not intend to supplant such laws"); *Allen*, 449 U.S. at 99 (in enacting § 1983, "Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts").

134 See supra notes 66-70 and accompanying text.

135 See supra notes 71-78 and accompanying text.


137 See Currie, supra note 68, at 328.


139 See Fernandez v. Trías Monge, 586 F.2d 848 (1st Cir. 1978); Brown v. Chastain, 416 F.2d 1012, 1020-21 (5th Cir. 1978) (Rives, J., dissenting).
1983 exception, however circumscribed, has been typically expressed as a function of the primary role of the federal courts in protecting federal constitutional rights. But Allen's emphatic rejection of the notion that a civil rights claimant has an absolute right to a federal forum undercuts the argument that a state court litigant is entitled to withhold a civil rights claim so as to ensure access to the federal court. If the policies underlying section 1983 are insufficient to prevent the application of issue preclusion, there would seem to be no reason for treating the question of claim preclusion differently.

The proponents of a claim preclusion exception for section 1983 claims generally rely on two Supreme Court decisions: Monroe v. Pape, and England v. Louisiana State Board of Medical Examiners. In light of Allen, neither Monroe nor England provides solid support for the purported exception. The Monroe Court recognized that section 1983 was enacted in part because of the perceived inadequacy of state court remedies. In Allen that motive was translated into the principle that a prior state court judgment should be binding unless the state court proceeding did not afford a full and fair opportunity to litigate the constitutional claim. Under Kremer, moreover, the "full and fair opportunity" was equated with the minimum requirements of procedural due process. Hence, section 1983, as interpreted in Monroe and reinterpreted in Allen, does not support an exception to claim preclusion based on a presumed inadequacy of the state courts. Rather, the state proceeding in which the litigant might have raised the federal claim must be shown to have been inadequate in fact in order for the litigant to escape the operation of claim preclusion.

On the other hand, a passage from Monroe that was not addressed in Allen provides superficial support for the limited section 1983 exception to full faith and credit. In holding that a section 1983 claimant need not exhaust state judicial remedies, the Monroe Court explained that "[t]he federal remedy is supplementary to the state remedy, and the latter need..."
not be first sought and refused before the federal one is invoked. In reliance on that language, lower courts have reasoned by analogy that the federal claim need not be first asserted in state court before being advanced in federal court. The Monroe statement, however, must be read in context. The Court was at that point considering whether the plaintiffs had stated a cause of action under section 1983. Specifically addressing the question of state action, the Court rejected the argument that a state officer's conduct, if violative of state law, could not be deemed "under color" of state law for purposes of section 1983. The Court determined that "under color" of state law included conduct taken under the cloak of official authority whether or not such conduct was in accordance with applicable state statutes. The Court therefore concluded that a litigant need not first obtain a state court's imprimatur on the challenged conduct in order to establish the requisite state action. The Court did not even consider the possibility of successive state and federal challenges. Hence, the rule of nonexhaustion does not speak to the situation which activates claim preclusion—where the would-be federal litigant has already sought redress in state court. In short, those who rely on the nonexhaustion rule of Monroe to support an exception to claim preclusion are applying the holding out of context and imputing to the rule a meaning not intended by the Court.

An alternative argument in support of the section 1983 exception derives from the England holding that a state court judgment is conclusive of a federal constitutional claim only if the litigant freely and unreservedly submitted the federal claim for decision in the state court. Advocates

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194 Monroe, 365 U.S. at 183.
196 Monroe, 365 U.S. at 181-83.
197 Id. at 182-87.
198 Cf. Huffman v. Pursue, Ltd., 420 U.S. 592, 609-10 n.21 (1975) (requirement of exhaustion of appellate remedies is not inconsistent with Monroe since Monroe "had nothing to do with the problem . . . of the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues.").
199 The nonexhaustion rule recognized in Monroe is not a unique attribute of §1983 claims. In general, a federal court litigant need not exhaust state judicial remedies. Bacon v. Rutland R.R., 232 U.S. 134 (1914). Indeed, in light of the full faith and credit mandate, the imposition of a general rule requiring exhaustion of state judicial remedies would repeal the jurisdiction of the lower federal courts. The fact that the rule of nonexhaustion is not unique to §1983 undercuts the argument that such a rule somehow marks the civil rights statute as special. To the contrary, a statute which affirmatively requires exhaustion of state judicial remedies is more susceptible of a construction that Congress intended to create an exception to full faith and credit, at least with regard to issue preclusion. See 28 U.S.C. § 2254(d) (1976); Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). The recently reaffirmed rule that §1983 plaintiffs need not exhaust state administrative remedies, Patsy v. Board of Regents, 102 S. Ct. 2557 (1982), likewise lends no support to the argument for a claim preclusion exception. Indeed, the Court in Patsy noted that an exhaustion requirement would raise difficult res judicata questions. Id. at 2567.
of the claim preclusion exception for section 1983 have contended that at least involuntary litigants in state court should be allowed to withhold their federal claims for later assertion in federal court as a function of choice of forum.200

The choice of forum rationale does not survive Allen's narrow construction of the England doctrine. The Allen Court made clear that England's recognition of the right to reserve a federal claim in state court was confined to the context of an abstention order.201 Allen indicates that an attempted reservation or withholding of a federal claim, outside the abstention context, would be improper. Moreover, the choice of forum argument is, at core, another version of the theory rejected in Allen that everyone has the right to litigate a federal constitutional claim in federal court.

Claim preclusion by definition denies a choice of forum to defendants who might prefer to litigate their defenses elsewhere; section 1738 extends the doctrine to an intersystem context. The operation of claim preclusion may seem particularly Draconian where a litigant is foreclosed from asserting a federal civil rights claim that was omitted from an earlier state court proceeding. Nevertheless, the Supreme Court made clear in Allen that the state judiciary is fully competent to render binding determinations on such claims. Since Congress has not vested exclusive jurisdiction over civil rights claims in the federal courts or otherwise lessened the effect of state court proceedings in civil rights cases, there is no basis for reading a section 1983 exception into the full faith and credit mandate.202

200 See, e.g., Theis, supra note 87; Developments, supra note 87, at 1342-43.

201 See supra note 100. The applicability of the England doctrine to the various categories of abstention orders is problematic. The Supreme Court has strongly implied that the reservation technique is available only where abstention is invoked pursuant to Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), and not in the context of abstention under Younger v. Harris, 401 U.S. 37 (1971); Judice v. Vail, 430 U.S. 327, 337 (1977). Indeed, allowing a reservation of a federal claim would make little sense under Younger since the result of a Younger abstention order is dismissal, rather than postponement, of the federal lawsuit, and such an abstention order presupposes an adequate opportunity to raise the constitutional claim in the state court. The confusion surrounding these doctrines is illustrated by two cases from the Third Circuit. In New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir.), cert. denied, 439 U.S. 894 (1978), simultaneous state and federal actions were brought challenging various educational regulations, and the district court dismissed the federal suit under Younger. While appeal to the Third Circuit was pending, the state action terminated in an order sustaining the regulations. The court of appeals held that (1) the district court had improperly dismissed the federal action, and (2) the plaintiffs were not barred by their failure to have raised their constitutional claims in state court. As to its second holding, the court relied in part on the England doctrine. In Switlik v. Hardwicke Co., 651 F.2d 852 (3d Cir. 1981), involving a duplicative § 1983 action following an unsuccessful state court suit, the plaintiffs asserted Burke as precedent. The Third Circuit, rather than relying on the fact that the plaintiffs in Switlik had actually litigated their federal claims in state court, distinguished Burke and England as cases involving "abstention." The court thus overlooked the different category of abstention order involved in each case and the fact that Burke had held abstention inappropriate.

202 At least two courts have concluded on the basis of Allen and Kremer that other civil
Claims within the exclusive jurisdiction of the federal courts are, by definition, outside the normal presumption of state court competence since Congress has deprived the state courts of their normal residual jurisdiction. In general, the legislative motives for granting the federal courts exclusive jurisdiction include a desire for uniformity in the interpretation and enforcement of a federal statutory scheme, a belief that only the federal courts can provide the needed expertise, and the fear that error in the state courts is unusually likely.

The operation of res judicata and full faith and credit in the exclusive jurisdiction context has given rise to a body of inconsistent case law and considerable commentary. The controversy for the most part has


Exclusive jurisdiction in the federal courts is the exception, and exclusivity will not be inferred unless there is an express provision to that effect, an unmistakable implication from legislative history, or a clear incompatibility between state court jurisdiction and federal interests. E.g., Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962). See generally D. CURRIE, CASES AND MATERIALS ON FEDERAL COURTS 376 (1975). The understanding of the Framers was that the state courts would maintain their general jurisdiction and would not be excluded from hearing federal claims except in the unusual case. See The Federalist No. 82 (A. Hamilton). Exclusivity has been expressly provided in 28 U.S.C. §§ 1333 (admiralty, maritime, and prize), 1334 (bankruptcy), 1338 (patent and copyright), 1346(b) (tort suits against United States), 1351 (actions against consuls), 1355 (federal penalty or forfeiture), 1356 (seizures not within admiralty or maritime); 15 U.S.C. § 78aa (Securities Exchange Act of 1934); 18 U.S.C. § 3231 (criminal actions); 40 U.S.C. § 270b (suits on government contractors' bonds). Exclusivity has been implied under, e.g., 28 U.S.C. § 1346(a) (taxpayer suit for refund); 15 U.S.C. §§ 15, 26 (antitrust).

See D. CURRIE, supra note 203, at 376. Although each grant of exclusive jurisdiction should be examined separately to ascertain the particular legislative motive, legislative hearings and debates are often not helpful in revealing the purpose and intended scope of the jurisdictional grant. See, e.g., In re Transocean Tender Offer Sec. Litig., 427 F. Supp. 1211, 1219, 1221 (N.D. Ill. 1977); Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 Harv. L. Rev., 509, 511-14 (1957). For purposes of this discussion it will be assumed that the two basic motives underlying a congressional grant of exclusive jurisdiction are the desire for uniformity in the interpretation and enforcement of the federal statute, and the desire for development of federal expertise.


204 See, e.g., Einhorn & Gray, The Preclusive Effect of State Court Determinations in Federal Actions Under the Securities Exchange Act of 1934, 3 J. Corp. L. 235 (1978); Comment,
surrounded the question of issue preclusion. Because state courts have long been recognized as competent to decide defenses arising under exclusive jurisdiction statutes, a state court's determination of such a defense is frequently the subject of a plea of collateral estoppel in a later federal court action. For example, in a state-law contract action the defendant may defend on the ground that the contract was illegal under the federal antitrust laws. If the state court sustains the defense, the defendant may then pursue affirmative relief under the antitrust laws in federal court and seek to invoke collateral estoppel offensively on the antitrust question. Alternatively, if the defendant loses in state court but still files for affirmative relief in federal court, issue preclusion will be asserted defensively. In either situation, the federal court must decide whether Congress in enacting the exclusive jurisdiction statute intended to relax the full faith and credit requirement so as to divest the state court findings of their normal binding effect.

Although it has been argued that to give collateral estoppel effect to state court findings in such a situation would undermine the congressional policy of exclusivity, the Supreme Court has indicated that full preclusive effect should be accorded actual state court determinations of fact and law, even where the determination involves matters within exclusive federal court jurisdiction. In Becher v. Contoure Laboratories, a prior...
state court action had determined that Becher had breached an agreement of confidentiality and wrongfully obtained a patent on a machine invented by his employer. After the state court decreed an assignment of the patent to the employer, Becher brought suit for patent infringement against the employer in clear contravention of the state court judgment. The Supreme Court held that the facts established in the state court action were binding in the patent infringement suit. In his brief opinion for the Court, Justice Holmes stressed that the state court had been acting fully within its jurisdiction and that the state court action arose wholly under state law. Justice Holmes then turned to the impact of the state court findings on the later suit for infringement:

That decrees validating or invalidating patents belong to the courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void.

Some authorities have read Becher as limited to questions of historical or incidental fact. The rightful ownership of the patent was, however, a mixed question of fact and law, albeit state law, and indeed was determinative of the ultimate issue of the patent's validity. A better reading of Becher would seem to be that factual and legal determinations made by a state court are presumptively binding in a later action in federal court so long as the state court had jurisdiction to make the determinations. Such a presumption is supported by the view that the fundamental goal of section 1738 is to ensure the conclusiveness of actual state court determinations. The presumption may be overcome by a showing of a specific statutory repeal of the issue preclusion component of full faith and credit. Becher makes clear that the grant of exclusive jurisdiction alone is not a sufficient basis for inferring such a repeal.

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210 Id. at 390.
211 Id. at 391-92.
212 Id.
213 See, e.g., Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 188 (1955), where the court distinguished Becher on the ground that in Becher collateral estoppel was applied to "one of the constituent facts that together [made] up a claim," not to "the entire congeries of such facts, taken as a unit." The attempted distinction fails to note that Becher's application of collateral estoppel involved more than incidental facts. Becher's infringement claim was effectively precluded by the state court judgment. The distinction has been criticized by courts and commentators. See, e.g., Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 491 (4th Cir.), cert. denied, 102 S. Ct. 359 (1981); 1B J. Moore & T. Currier, supra note 61, ¶ 0.455, at 4113-14; Developments, supra note 87, at 1335 n.20; Collateral Estoppel Note, supra note 206, at 1282-85; Res Judicata Note, supra note 206, at 1367-69.
214 See supra notes 53, 141-42 and accompanying text.
215 Accord, Abramson v. Pennwood Inv. Corp., 392 F.2d 759 (2d Cir. 1968) (state shareholders derivative suit did not preclude federal action under Securities Exchange Act, but facts determined in state action were binding in federal court); Vanderveer v. Erie Malleable Iron Co., 238 F.2d 510 (3d Cir. 1956) (state court determination that licensee's activity was not infringement of plaintiff's patent was conclusive of issue of infringement in plaintiff's
Kremer likewise supports the view that issue preclusion operates fully in a state-to-federal context even where the later action is within exclusive federal jurisdiction. In Kremer, the Court expressly left open the question of whether the federal courts have exclusive jurisdiction over Title VII claims. Because the Court went on to hold that the state court’s rejection of Kremer’s discrimination claim was entitled to full faith and credit in the federal court, it can be inferred that the presence of exclusive jurisdiction would not have altered the result. Indeed, Kremer establishes that section 1738 is fully operative unless Congress indicates an unmistakable intention to the contrary. The Court’s deferral of the jurisdictional question under Title VII indicates that a grant of exclusive jurisdiction, without more, will not automatically be deemed a repeal of section 1738, at least with respect to issue preclusion.

In contrast, a grant of exclusive federal jurisdiction should be presumed to create an exception to the claim preclusion component of section 1738. Allen and Kremer require that Congress “clearly manifest its intent to depart from § 1738”, a grant of exclusive jurisdiction provides such a manifestation with regard to the doctrines of merger and bar. The question of claim preclusion typically arises in the following way. When federal and state statutes provide similar remedies for the same conduct and the federal statute is within exclusive federal jurisdiction, a plaintiff may first seek relief in state court under state law and later appear in federal court.

Several commentators have espoused a choice-of-forum approach to the question of issue preclusion in the exclusive jurisdiction context. The argument is that a state court litigant should not be bound by a determination on matters within exclusive federal court jurisdiction unless the litigant voluntarily sought out the state forum. See, e.g., Collateral Estoppel Note, supra note 206, at 1290-94; Note, The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction over Section 10(b) of the Securities Exchange Act of 1934, 46 N.Y.U. L. Rev. 936, 966-68 (1971). This approach overlooks the principle that the state courts have been deemed competent to determine federal defenses based on exclusive jurisdiction statutes. If the state courts are deemed competent to determine particular issues, then their determinations should be entitled to the usual finality. See Currie, supra note 68, at 347. The question would seem better resolved by according full preclusive effect to actual state determinations while invoking the choice-of-forum rationale in cases where the state court litigant has withheld the federal defense. See infra note 232 and accompanying text.

216 Kremer, 102 S. Ct. at 1896 n.20. The lower courts are in disagreement on the question of Title VII’s jurisdictional status. See supra note 112.

217 Kremer implicitly rejected the view that collateral estoppel operates only as to state court determinations of historic fact. The state court determination in Kremer incorporated the basic factual and legal question at issue in the federal proceedings.

218 Accord, Hathorn v. Lovorn, 102 S. Ct. 2421, 2430 n.23 (1982) (dicta) (in recognizing state court power to collaterally decide issues of preclearance under Voting Rights Act, Court suggests that common notions of issue preclusion would obtain in such a context).

219 See Brown v. Felsen, 442 U.S. 127 (1979); see also supra notes 72-79 and accompanying text.

220 Allen, 449 U.S. at 96-99; Kremer, 102 S. Ct. at 1894-95.
under the federal statute. In such a circumstance, a defense of claim preclusion might be asserted on the theory that the state and federal actions constituted the same claim.\footnote{221}

Under standard section 1738 analysis, the federal court would be compelled to dismiss the federal action if the state’s law of res judicata so required.\footnote{222} However, the literal directive of section 1738—that a state court judgment be accorded the same effect in federal court as it would have in the courts of the rendering state—should not be followed when the second action is within exclusive federal jurisdiction and the specific res judicata problem is claim preclusion. The state courts will rarely have addressed the preclusive effect of a state law claim on a later action within exclusive federal jurisdiction.\footnote{223} Moreover, it would seem institutionally inappropriate to look to state law to characterize, for res judicata purposes, a claim within exclusive federal jurisdiction. The grant of exclusive federal jurisdiction is necessarily an indication of a strong federal interest in uniformity in the interpretation and enforcement of the pertinent federal statutory scheme.\footnote{224} Federal court adherence to the res judicata law of each individual state could result in an inconsistency among the federal courts in their treatment of claims which are their exclusive prerogative.\footnote{225}

\footnote{221 See Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981), cert. denied, 102 S. Ct. 359 (1982) (consent judgment in favor of plaintiff’s privy in state antitrust suit precluded plaintiff’s federal antitrust action against same defendant); cf. Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964) (dismissal of prior state antitrust action, after removal to federal court on diversity grounds, barred federal antitrust action by same party). Of course, if the plaintiff is the losing party in the state court action, a later federal suit may be effectively barred by the operation of issue preclusion without regard to the doctrine of claim preclusion.}

\footnote{222 See RESTATEMENT (SECOND) OF JUDGMENTS § 86 (1982); see generally supra notes 48-49 and accompanying text.}

\footnote{223 State courts would have little reason to consider such a question since they lack power to enjoin relitigation in federal court on res judicata grounds. See Donovan v. City of Dallas, 377 U.S. 408 (1964).}

\footnote{224 See Collateral Estoppel Note, supra note 206, at 1281-82.}

\footnote{225 Justice Stevens’ plurality opinion in Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), supports by analogy the view that exclusive jurisdiction statutes create an exception to the claim preclusion component of full faith and credit. In Thomas the plurality held that the full faith and credit requirement did not bar a supplemental award to the petitioner under the workmen’s compensation laws of the District of Columbia even though the petitioner’s prior recovery of benefits in Virginia excluded as a matter of Virginia law any other recovery. The core of Justice Stevens’ reasoning is revealed in the following passage: [T]he Virginia Commission could and did establish the full measure of petitioner’s rights under Virginia law, but it neither could nor purported to determine his rights under the law of the District of Columbia. Full faith and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make. Since it was not requested, and had no authority, to pass on petitioner’s rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights.}

\textit{Id.} at 282-83. Thus, while the issue preclusion component of § 1738 may be fully applicable
The "might have been litigated" aspect of claim preclusion poses an additional problem. Because of the posited exclusive federal jurisdiction, a federal court in a second action could never conclude that the federal claim might have been litigated in state court.\(^\text{225}\) A countervailing practical argument is that the plaintiff in the hypothetical could have filed originally in federal court and asserted the state law claim as a pendent claim, thereby raising all theories of relief in one litigation.\(^\text{227}\) Although such an approach would serve the general res judicata goal of judicial economy by encouraging litigants to present their entire controversies in a single proceeding, this approach surely is not compelled by full faith and credit. Indeed, the courts which have embraced such an argument have done so as a matter of a purely federal doctrine of res judicata.\(^\text{228}\) Although it may be sound policy under certain circumstances to bar a claim within exclusive federal jurisdiction,\(^\text{229}\) the federal court should be free to formulate the policy as a matter of federal law.

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\(^{225}\) The new Restatement recognizes as much. The general rule [of merger and bar] is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of the litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from the second action in which he can present those phases of the claim which he was disabled from presenting in the first.

\(^{226}\) Decisions holding that a federal court judgment on an exclusive jurisdiction claim precludes a state court action on a similar state law claim are not apposite. Where an exclusive jurisdiction claim is filed, the plaintiff has the option of asserting a related state law claim through an invocation of pendent jurisdiction; hence, the "might have been litigated" standard of claim preclusion would be satisfied. See, e.g., Ford Motor Co. v. Superior Ct., 35 Cal. App. 3d 676, 680, 110 Cal. Rptr. 59, 62 (1973); Belliston v. Texaco, Inc., 521 P.2d 379, 382 (Utah 1974); cf. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1980) (state law action removed to federal court as disguised federal antitrust action was subject to dismissal on res judicata grounds since plaintiffs had previously filed and lost identical federal antitrust suit). See generally Note, The Res Judicata Implications of Pendent Jurisdiction, 66 CORNELL L. REV. 608 (1981). Moreover, when a federal court renders the initial judgment, the problem is generally one of res judicata and not full faith and credit. Stoll v. Gottlieb, 305 U.S. 165, 171 (1938).

\(^{227}\) See Marrese v. American Academy of Orthopaedic Surgeons, 51 U.S.L.W. 2297 (7th Cir. 1982); 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 5, § 4470, at 687.

\(^{228}\) See, e.g., Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981), cert. denied, 102 S. Ct. 359 (1982), where the court alluded to the mandate of § 1738 but then applied a federal law of res judicata to determine the preclusive effect of a state court consent judgment on a later federal antitrust action.

\(^{229}\) For example, where the state court plaintiff has obtained a favorable judgment, denying the plaintiff the right to seek additional relief under a statute within exclusive federal jurisdiction would serve the policy of avoidance of duplicative recovery. See Nash County
The suggested claim preclusion exception is more problematic in the context of an omitted defense. Where a state court defendant has a potential defense based on the plaintiff's violation of a federal statute within exclusive federal jurisdiction, the defendant's failure to assert such a defense might lead to a plea of res judicata if the defendant later attempts to sue for affirmative relief in federal court under the same statute. Assume, for example, that an action based on a brokerage contract is filed in state court and that purely state law defenses are raised. After the plaintiff-broker recovers judgment, the defendant sues the same opponent in federal court and contends that the contract violated the federal securities laws. As damages the federal court plaintiff seeks, in part, recovery of moneys paid pursuant to the state court judgment.

In such a situation the federal court suit may have the result of nullifying rights established by the state court judgment; thus, the full faith and credit statute is clearly implicated. Nevertheless, the suggested exception for claim preclusion should still obtain. Although congressional motives for granting exclusive jurisdiction under different statutes vary, any grant of exclusive federal jurisdiction is, at the least, an indication that Congress prefers the federal forum for resolution of the particular claim. In order to vindicate that preference, the state court defendant must be free to choose to litigate the federal issues in federal court.

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Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 493 (4th Cir. 1981), cert. denied, 102 S. Ct. 359 (1982). Of course, that policy presupposes that the same remedies would be available under the state statute as under federal law. Id. at 490, 492. In Marrese v. American Academy of Orthopaedic Surgeons, 51 U.S.L.W. 2297 (7th Cir. 1982), where the court disallowed plaintiffs' federal antitrust claims on res judicata grounds, the basic requirement of identical or comparable remedies was violated. There the plaintiffs had previously lost a state court proceeding challenging the same conduct by defendants under state common law. Noting that the plaintiffs could have raised a state antitrust claim in their state court action, the court concluded that the state and federal actions involved the same claim, notwithstanding a material difference in remedies under the state and federal statutes. The court rationalized the result in terms of efficiency and judicial economy, but such goals would seem subordinate to the litigants' right to seek the unique relief available under federal law.

The facts, if transposed to the antitrust context, parallel those in Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977). Professor Currie has argued that the plea of res judicata in such circumstances should be sustained. Currie, supra note 68, at 347. It is contended here that while preclusion may be warranted as a matter of sound res judicata policy, the federal courts should be free of the mandate of § 1738 in formulating that policy.

Somewhat different considerations are raised if the state court defendant goes immediately to federal court to assert the federal law contention offensively. Ideally, in such a circumstance the state court would voluntarily stay its proceedings pending resolution by the federal court of the federal issue. A voluntary postponement in state court would not only avoid a waste of the state court's resources but would also serve the policy of inter-system comity. On the other hand, if the federal court, rather than the state court, were to stay its proceedings, difficult questions of res judicata and full faith and credit would be squarely raised. See Will v. Calvert Fire. Ins. Co., 437 U.S. 655, 674 (1978) (Brennan, J., dissenting).

See, e.g., American Surety Co. v. Baldwin, 287 U.S. 156 (1932), discussed at supra notes 55-60 and accompanying text.

The rationale for the choice-of-forum theory was well-presented by Justice Stevens'
In other words, the choice-of-forum theory, while unavailable in civil rights cases because of the basic fact of concurrent jurisdiction, can be soundly applied in the exclusive jurisdiction context because Congress has by definition clearly manifested a preference for the federal forum.

Recognition of the claim preclusion exception to section 1738 under exclusive jurisdiction statutes should not signal a wholesale refusal by the federal courts to give any effect to prior state court proceedings. Rather, the exception would merely free the federal courts to fashion a federal doctrine of claim preclusion in the exclusive jurisdiction context. The definition of a cause of action, the concept of privity, and other particulars of the doctrine could be formulated with due regard for the competing policies of the exclusive jurisdiction statute, res judicata, and intersystem comity.

**CONCLUSION**

*Allen* and *Kremer* together resolved several issues which had perplexed the lower courts regarding the operation of full faith and credit in the federal/state context. The decisions reestablished the central role of section 1738 in determining the effects of state court proceedings in later federal court actions. At the same time, the decisions severely curtailed the federal courts' authority to recognize exceptions to the statutory mandate. The Court made clear that neither section 1983 nor Title VII constitutes such an exception, at least with respect to the issue preclusion component of full faith and credit. Moreover, *Kremer* established that the rule of section 1738 controls unless the state court litigation failed to satisfy a minimal standard of procedural due process.

On the other hand, the Court did not address the operation of claim preclusion in the state-to-federal context; ironically, the decisions in *Allen* and *Kremer* may cause that doctrine to be called into question with increasing frequency. Litigants seeking to avoid binding determinations of federal law in state court may withhold their federal claims with the expectation of securing an unencumbered hearing on the question in federal court. The federal courts' response to such tactics should be neither blanket rejection nor blind acquiescence. The courts should instead analyze each situation to ascertain at the outset the applicability of section 1738. Such an analysis should include examination of the rendering state's law

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Since the state courts do not have the power to award complete relief for an antitrust violation, since state judges are unfamiliar with the complexities of this area of the law, and since state procedures are sometimes unsatisfactory for cases of nationwide scope, no adverse inference should be drawn from a state-court defendant's election to reserve his federal antitrust claim for decision by a federal court.

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233 See *supra* notes 200-01 and accompanying text.
of res judicata with due regard for the full faith and credit goals of comity, finality of judgments, and repose. In many situations the state's doctrine of claim preclusion will bar the federal action. In some cases, however, particularly when prior criminal proceedings are involved, the federal action may not contradict actual determinations of the state court or disturb the finality of the judgment. It has been argued here that in such cases full faith and credit should be deemed inapplicable.

Allen and Kremer have left little room for the recognition of implied statutory exceptions to full faith and credit. In light of Allen's interpretation of section 1983 and the Court's emphasis on the presumed competence of the state courts in constitutional matters, there is no basis for recognizing a section 1983 exception to the claim preclusion component of full faith and credit. Indeed, the only situation in which the parity of state and federal courts cannot be presumed is where Congress has vested exclusive jurisdiction in the federal courts. In these cases, Congress has unambiguously manifested a preference for the federal forum. Under section 1738 analysis that preference should translate into an exception to claim preclusion. Hence, the federal courts should recognize the right of state court litigants to withhold claims falling within exclusive federal jurisdiction and should allow such claims to be asserted in the statutorily preferred forum.