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Where's the Beef? The Interjurisdictional Effects of New Jersey's Entire Controversy Doctrine

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WHERE'S THE BEEF? THE INTERJURISDICTIONAL EFFECTS OF NEW JERSEY'S ENTIRE CONTROVERSY DOCTRINE

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I. INTRODUCTION

New Jersey's Entire Controversy doctrine raises difficult analytical and policy questions, particularly as applied to the joinder of parties, when it is viewed from a domestic perspective. Viewed from interjurisdictional perspectives, the doctrine is challenging even for one who has probed the dark recesses of full faith and credit and federal common law.[1] It is no surprise, then, that a group of recent New Jersey supreme court decisions demonstrates some of the troubling aspects of the doctrine as domestic law. A case exploring its interjurisdictional effects, *MortgageLinq Corp.* v. *Commonwealth Land Title Insurance Co.*,[2] is at least as troubling, both analytically and as a matter of policy.

I propose to reexamine the interjurisdictional issues that were the subject of the New Jersey supreme court's decision in *MortgageLinq*. I will also consider other situations in which this creature of domestic law may be translated onto the national scene.

** David Berger Professor for the Administration of Justice, University of Pennsylvania. I have profited from the comments and suggestions of participants in the Symposium, including, in particular, Geoffrey Hazard and Linda Silberman, of faculty workshop participants at the Roger Williams University School of Law, and, as always, of Leo Levin.

1. *See* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986) [hereinafter Burbank, *Interjurisdictional Preclusion*]; Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEXAS L. REV. 1551 (1992) [hereinafter Burbank, *Sources*].

2. 142 N.J. 336, 662 A.2d 536 (1995). The plaintiff corporation's name is variously spelled "MortgageLinq" and "Mortgagelinq" in state court and federal court opinions. "MortgageLinq" is correct.

The other cases, decided the same day, are: Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 662 A.2d 523 (1995); Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280, 662 A.2d 509 (1995); and DiTrolio v. Antiles, 142 N.J. 253, 662 A.2d 494 (1995).

The New Jersey Supreme Court ignored distinctions that may be important to a clear and correct analysis, including the court whose judicial proceedings were in question as F1 (state or federal?) and the status of those proceedings at the time the New Jersey trial court ruled as F2 (judgment or no judgment?). I proceed by treating such distinctions as important for analysis of New Jersey's obligations under federal law.

I conclude that, on the assumptions that F1 was a state court that had entered judgment prior to a ruling in F2, the *MortgageLinq* decision violated those obligations in two ways. First, as F2, New Jersey failed to give full faith and credit to the judicial proceedings in F1. This conclusion depends on findings that as a matter of language, purpose and precedent, the full faith and credit statute forbids giving greater, as it obviously forbids giving less, preclusive effect to F1's judicial proceedings than would be given in F1.[3]

Second, in attempting to avoid violating its federal obligations as F2, New Jersey violated them in a different way (and prospectively as F1) by purporting to control a matter—the interjurisdictional effects of its own proceedings—contrary to federal law. Because the court was so intent on preserving power to deal as it wished with the problem before it, in the face of federal law, it attempted to surrender power that is conferred by federal law.[4]

I also conclude that it makes no difference for these purposes whether F1 was a state or federal court, or if it was a federal court, whether its judicial proceedings involved the adjudication of a federal question or a state law question in diversity. Understanding that conclusion, however, requires a sensitive appreciation of the interplay between federal common law and the Federal Rules of Civil Procedure.[5]

Finally, I conclude that one seemingly critical distinction ignored by the Court in *MortgageLinq*—between a case in which the rendering court (F1) has entered a judgment and a case in which it has not—may not, in fact, make a difference to the proper result in such a case. If so, this is a situation where, contrary to the conventional wisdom, a judgment in F1 is not necessary to the existence of a federal full faith and credit obligation in F2.[6]

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3. *See* 28 U.S.C. § 1738 (1996), *quoted*, *infra* note 18; *infra* text accompanying notes 17-75.

4. *See infra* text accompanying notes 76-95.

5. *See infra* text accompanying notes 96-115.

6. *See infra* text accompanying notes 116-47. For the sake of completeness, the article also deals, in section IV, with situations in which New Jersey is F1. *See infra* text accompanying notes 148-68.

II. THE NEW JERSEY SUPREME COURT'S DECISION

MortgageLinq was an action brought in New Jersey state court by MortgageLinq, a New Jersey/Pennsylvania-based mortgage lender, and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), assignee of mortgage loans made by MortgageLinq. They sued New Jersey-based companies and individuals (the "New Jersey defendants") that were allegedly involved as accessories in a fraudulent scheme involving mortgage financing on twenty-four properties. All but one of these properties was located in Atlantic County, New Jersey.

Almost a year earlier, MortgageLinq had brought another action in federal court in Pennsylvania, against Pennsylvania-based companies and individuals who were alleged to be the central figures in the scheme.[7] Freddie Mac had intervened as a plaintiff in the federal action. The two cases involved the same twenty-four mortgage transactions and the same scheme.[8]

Three of the New Jersey defendants moved to dismiss the state case as barred by the Entire Controversy doctrine.[9] The trial court granted the motions and dismissed the complaints against those defendants with prejudice. The court found that the plaintiffs were aware of the New Jersey defendants at the time they filed the Pennsylvania federal case, that the New

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7. The Pennsylvania defendants would purchase property from its owner for a purchase price near its fair market value (the A transaction). The property was fraudulently resold on the same day to another Pennsylvania defendant (the B transaction) at a price substantially higher than the purchase price of the A transaction . . . . In each instance, Mortgagelinq . . . provided mortgage financing based on the inflated purchase price in the B transaction. Mortgagelinq sold some of the mortgages to Freddie Mac . . . . Plaintiffs allege that the title companies who closed title in those transactions must have been aware of the fraud . . . .

MortgageLinq, 142 N.J. at 339-40, 662 A.2d at 538.

8. After the New Jersey state case had been filed, two of the defendants in the Pennsylvania federal case sought to force the joinder of the New Jersey defendants, either as additional defendants or as third party defendants. MortgageLinq and Freddie Mac opposed the motion, and the federal court denied it.

The history of the litigation in state and federal courts is sketched in the New Jersey supreme court's opinion. *See MortgageLinq*, 142 N.J. at 340-42, 662 A.2d at 538-39. A more complete account of the federal cases, upon which my summary also draws, is found in Federal Home Loan Mortgage Corp. v. Commonwealth Land Title Ins. Co., 1993 U.S. Dist. LEXIS 4051 (E.D. Pa. 1993).

9. The Pennsylvania federal action was pending—no judgment had been entered—at the time the motions were filed in the New Jersey state case and when the trial court in New Jersey ruled on those motions. *See* MortgageLinq v. Commonwealth Land Title, 262 N.J. Super. 178, 182, 620 A.2d 456, 457 (Law Div. 1992), *aff'd*, 275 N.J. Super. 79, 645 A.2d 787 (App. Div. 1994), *aff'd in part and rev'd in part*, 142 N.J. 336, 662 A.2d 536 (1995).

Jersey defendants were subject to personal jurisdiction in Pennsylvania, and that the subject matter of the two suits was identical. The court held that "the entire controversy doctrine operates to bar suits against parties which could and should have been joined in a previous suit despite the fact that the earlier suit was brought in another state or federal court."[10]

Prior to taking an appeal in their New Jersey state case,[11] MortgageLinq and Freddie Mac made their adversaries in that proceeding defendants in another federal case in Pennsylvania.[12] Some of the defendants moved to have the case dismissed as precluded by full faith and credit to the New Jersey orders of dismissal. The federal court denied these motions on the ground that the New Jersey judgment was not final.[13] The court observed, however, that once final, the New Jersey judgment would be preclusive in federal court.[14]

After the Appellate Division affirmed the Law Division's decision dismissing the complaint in the New Jersey case, the supreme court granted the plaintiffs' petition for certification. The court discerned two questions of interjurisdictional import: "The issue is whether the non-joinder of parties in a related action in the Pennsylvania federal court results in the same party preclusion in New Jersey [as would occur if the two cases had been brought successively in New Jersey courts]. If so, what is the effect of that preclusion in other jurisdictions?"[15]

The court held that the plaintiffs were precluded from suing in New Jersey the defendants who had been omitted from the federal case in Pennsylvania, even though they would not have been precluded from suing them in federal court. The court also held, that this result was binding only

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10. *MortgageLinq*, 262 N.J. Super. at 190, 620 A.2d at 461.

11. The Entire Controversy dismissals applied to three defendants, leaving a pending case in the trial court against four defendants. As a result, the plaintiffs could not take an immediate appeal, and the dismissals were held not final for purposes of preclusion. *See infra* text accompanying note 13.

12. According to the New Jersey supreme court, by the time the plaintiffs filed the second federal case in September 1992, the initial case "had . . . been concluded by settlements or default judgments against most of the named defendants." *MortgageLinq*, 142 N.J. at 342 n.2, 662 A.2d at 539 n.2. However, judgment was not entered against thirteen of the defendants until July 21, 1993. *See* Federal Home Loan Mortgage Corp. v. Commonwealth Land Title Ins. Co., 1993 U.S. Dist. LEXIS 4051, at *5 (E.D. Pa. 1993).

13. *Id.* at *35-36.

14. *Id.*

15. *MortgageLinq*, 142 N.J. at 343, 662 A.2d at 540.

in New Jersey, leaving other jurisdictions free to permit litigation against the omitted defendants in their courts.[16]

With respect, the court's affirmative answer to the first question is wrong, and, although its answer to the second question was intended to save the day, that answer is impermissible.

III. NEW JERSEY AS THE SECOND FORUM (F2)

A. Some Simplifying Assumptions

The first question identified by the New Jersey supreme court in *MortgageLinq* has to do with that state's freedom to treat the judicial proceedings of another jurisdiction as if they were New Jersey domestic proceedings for purposes of applying the Entire Controversy doctrine. It will advance the analysis of the problem to make two counterfactual assumptions. First, let us assume that the related action was filed in the courts of another state (rather than in federal court)—that, in other words, F1 was a state court. Second, let us assume that F1 entered judgment prior to a ruling on the Entire Controversy issue in F2. The purpose of both assumptions is to remove potential obstacles to consideration of New Jersey's obligations under the full faith and credit clause of the Constitution[17] and its implementing statute.[18] Once those basic issues have been explored, it will be time to return to the even more exotic problems suggested by the facts of *MortgageLinq*.

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16. *Id.* at 347, 662 A.2d at 542.

17. "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." U.S. CONST. art. IV, §1.

18. The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

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

28 U.S.C. § 1738 (1996) (emphasis added).

To say that the stated assumptions remove some of the potential obstacles to full faith and credit analysis is not to say that the court in *MortgageLinq* deemed the matters they addressed important, or that the assumptions remove all such obstacles. Indeed, the court in *MortgageLinq* (1) relied indiscriminately on lower court decisions that involved prior proceedings in state and federal courts and that ignored interjurisdictional complications,[19] (2) barely mentioned full faith and credit,[20] (3) disparaged the precedential value of the only cited lower court decision that did consider interjurisdictional complications,[21] and (4) failed even to note the stage of the proceedings in F1 when the court in F2 (New Jersey) ruled.[22]

If the question had been whether plaintiffs were precluded from suing, in F2, persons who had not been joined as defendants in a case that had gone to judgment in a court of another state (F1) where they would not be precluded, it is hard to see how the federal question of full faith and credit could have been avoided.

Both the constitutional provision and the statute require that full faith and credit be given to the "judicial proceedings" of other states.[23] Although it is a mistake to regard a court judgment as a synonym for "judicial proceedings," rather than as a product of such proceedings,[24] full faith and

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19. *See* Gross v. Cohen DuFour & Assocs., 273 N.J. Super. 617, 642 A.2d 1074 (Law Div. 1993) (related New Jersey federal litigation); Giudice v. Drew Chem. Corp., 210 N.J. Super. 32, 509 A.2d 200 (App. Div. 1986), *certif. granted and summarily remanded on other grounds*, 104 N.J. 465, 564, 517 A.2d 448, 449 (1986) (related New York state litigation). Apart from the failure of either decision to consider possible interjurisdictional complications, the lower court in *Gross* relied on the lower court opinion in *MortgageLinq*. *See Gross*, 273 N.J. Super. at 625-26, 642 A.2d at 1079-80.

Elsewhere in its opinion in *MortgageLinq*, the New Jersey Supreme Court observed that "[b]ecause the federal courts are considered those of another sovereign . . . [federal-state] cases will also serve to guide us in cases involving proceedings in other states." *MortgageLinq*, 142 N.J. at 346, 662 A.2d at 541.

20. "Maintaining a cohesive federal system (and the Full Faith and Credit Clause melds state courts into that system) does not require that the other parts of the federal system honor our entire controversy doctrine." *Id.* at 348, 662 A.2d at 542.

21. *See* Kimmins Abatement Corp. v. Conestoga-Rovers & Assocs., Inc., 253 N.J. Super. 162, 601 A.2d 256 (Law Div. 1991). The *MortgageLinq* court distinguished *Kimmins Abatement*. *MortgageLinq*, 142 N.J. at 344, 662 A.2d at 540.

22. In his dissent, Justice Pollock asserted that "the majority extends unduly New Jersey's entire controversy doctrine to determine the preclusive effect of a *judgment* rendered by a federal court in another state." *Id.* at 348-49, 662 A.2d at 542 (Pollock, J., dissenting) (emphasis added). *But see supra* note 9.

23. *See supra* notes 17 & 18.

24. *See infra* text accompanying note 121.

credit to court judgments was the central concern of the framers of the Constitution and of the members of the first Congress.[25]

In exercising its power to prescribe the effect to be given to state "judicial proceedings," Congress has always chosen to tie the measure of respect required of other courts, state and federal, to the measure of respect such proceedings have, "by law or usage," in the courts of the state from which they are taken.[26] Indeed, since 1948 the statute has described the obligation as giving "the same full faith and credit."[27]

B. Non-Obvious Avoidance Techniques

1. Labels and Static Conformity

It might be possible to avoid Congress' directive if the obligation it imposed were cabined in a way that is not obvious from the text. There are, after all, unstated exceptions to the statute's literal command.[28] Thus, if the obligation were limited to the requirements of preclusion law, framed as such, or of preclusion law as it existed in the late eighteenth century, it might not reach something called the "Entire Controversy doctrine," at least when used to enforce notions of mandatory party joinder that are idiosyncratic today and that were unknown and probably unthinkable in 1790.[29]

It would be silly—an invitation to evasion—to permit the content of the federal obligation to turn on state law labels. Following in this respect the

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25. *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 175-76 (1850); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 324-26 (1839); Kurt H. Nadelmann, *Full Faith and Credit to Judgments: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957).

26. The implementing statute enacted by the First Congress provided:

> [The duly authenticated] records and judicial proceedings of the courts of any state . . . shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the states from whence the said records are or shall be taken.

Act of May 26, 1790, ch. 11, 1 Stat. 122.

27. *See supra* note 18. For a discussion of the significance to be accorded changes made in 1948, when Congress revised the Judicial Code, see Nadelmann, *supra* note 25, at 81-86.

28. "Exceptions there are, but they are few and affect only a small number of judgments, and no tendency to enlarge them appears." Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 10 (1945). *See* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943).

29. This discussion covers both situations in which a New Jersey state court is F2 and situations in which it is F1.

unambiguous tenor of the statutory language, the Supreme Court of the United States has recently made it clear that labels are not determinative when considering the domestic law of F1.[30]

It would make even less sense to let the federal obligation turn on a label used in the domestic law of F2. Thus, historically and functionally, the application of the Entire Controversy doctrine to parties has been linked to its application to claims,[31] and both applications have been treated, by New Jersey and federal courts alike, as a species of preclusion doctrine.[32]

Full faith and credit would poorly serve its intended function as a "nationally unifying force,"[33] and would be inadequate for contemporary needs, if the statutory obligation of conformity to the law applied in F1 were static—that is, limited to the law as it existed in 1790 or, for that matter, 1948. Again, the Supreme Court's decisions suggest no such limitation.

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30. "We note . . . that if a State chooses to approach the preclusive effect of a judgment embodying the terms of a settlement agreement as a question of pure contract law, a federal court must adhere to that approach under §1738." Matsushita Elec. Indus. Co., Ltd., v. Epstein, 116 S. Ct. 873, 880 n.6 (1996) (citation omitted).

"Without [an] implicit principle of functional equivalence full faith and credit would be a far weaker instrument than it is and would be of little help in integrating the legal systems of the states." A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 1460 (1965).

31. Indeed, Rule 4:30A, which became effective in 1990, provides, in pertinent part, that "[n]on-joinder of *claims or parties* required to be joined by the entire controversy doctrine shall result in *the preclusion of the omitted claims* to the extent required by the entire controversy doctrine . . . ." N.J. CT. R. 4:30A (emphasis added). "The purposes that have stimulated the growth of the claims-joinder rule, which has historically been equated with the entire controversy doctrine, are similar, if not identical, to those of the party-joinder rule." Cogdell v. Hospital Ctr. at Orange, 116 N.J. 7, 21, 560 A.2d 1169, 1175 (1989). "[The] commonality of purposes . . . indicates that they are conceptual subsets of the entire controversy doctrine." *Id.* at 20, 560 A.2d at 1175.

32. "Although party preclusion is not an exact fit for application of principles of *res judicata* (usually the parties must be the same for *res judicata* to apply), the concepts are similar." *MortgageLinq*, 142 N.J. at 346 n.3, 662 A.2d at 541 n.3. "New Jersey's entire controversy doctrine is inextricably related to the general principles of res judicata." Electro-Miniatures Corp. v. Wendon Co., Inc., 889 F.2d 41, 43-44 n.5 (3d Cir. 1989). *See also* Prevratil v. Mohr, 145 N.J. 180, 187, 678 A.2d 243, 246 (1996) ("stems directly from the principles underlying the doctrine of res judicata or claim preclusion").

33. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935).

Indeed, the 1980 case in which the Court rediscovered the statute presented a problem of non-mutual issue preclusion, a distinctly modern development.[34] The Court's most recent full faith and credit decision involved the preclusive effect of a state court judgment approving the settlement of a class action on claims within exclusive federal subject matter jurisdiction.[35] That is a scenario as far removed from 1790 as is the composition of this article on a computer.

2. "Core" Rules and Policies

Another rationale for avoiding full faith and credit should be considered. It may be related to the last but is more sophisticated. Professor Cooper, an acute student of and commentator on the domestic and interjurisdictional law of preclusion, has suggested that the federal obligation should be confined to the "central core" of preclusion doctrine.[36] He proposes leaving state (and federal) courts in the position of F2 free to ignore aspects of preclusion doctrine followed by F1 that implicate neither the "core values of finality, repose, and reliance,"[37] nor the power of F1 to control its own procedures.

For example, if F1 would permit nonmutual issue preclusion, Professor Cooper would not require F2 to do the same.

> The major values served by nonmutual preclusion lie in the public costs of relitigation and the fear of inconsistency. A later court should be free to assume the costs of relitigation. And a first court should not be able to inflict on others its timorous fears of being proved wrong.[38]

Although intriguing and advanced with the author's customary refined judgment, the notion that there should be an exception to full faith and credit for some matters of preclusion deemed outside the "core" is problematic. It is not enough to observe that the proposal finds no explicit support in the full faith and credit statute or in Supreme Court decisions interpreting it. For, there *are* unstated exceptions, albeit very few now, to the literal command, and Professor Cooper invokes the "sorry history of workers'

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34. *See* Allen v. McCurry, 449 U.S. 90 (1980). For the "rediscovery" of the full faith and credit statute, see Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 801.

35. *See* Matsushita Elec. Indus. Co., Ltd. v. Epstein, 116 S. Ct. 873 (1996).

36. 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4467, at 625 (1981) [hereinafter E. COOPER].

37. *Id.* at 636.

38. *Id.* § 4465, at 617 (footnote omitted); *see id.* § 4467, at 642-43.

compensation cases" as "slight Supreme Court support for the proposition that a later state can narrow the preclusion rules that a prior state would apply to its own judgment."[39]

It also may be "not convincing" to argue "that full faith and credit demands a simple, clear, and unwavering standard, that if any departure is permitted from the law of the judgment court other states will substitute their own rules so often as to weaken the core of full faith and credit."[40] These are not, however, the only reasons to reject the proposal.

Professor Cooper makes judgments about the status of preclusion rules on the basis of a consideration of policies—finality, repose, and reliance—he deems central to the body of doctrine as a whole. Obviously, however, there is room for disagreement about both the most important preclusion policies and the most important rules, particularly over time. As an example of the difficulty of drawing lines (or circles), whatever one thinks of Professor Cooper's dispatch of the preclusion policy of "protect[ing] overworked courts," [41] his treatment of the policy is very much the work of an academic and, as he himself seems to recognize, very much out of step with contemporary judicial attitudes.[42]

Moreover, Professor Cooper sometimes seems to regard the policies animating *domestic* preclusion law as fungible with, and exhausting, the *interjurisdictional* policies animating full faith and credit.[43] Yet, the full faith and credit obligation is not limited to "judicial proceedings," let alone to judgments.[44] Moreover, a broader policy underlying the obligation that has not changed over time and that is independent of any discrete preclusion value is the policy of unifying or integrating the several states.[45] "It serves

39. *Id.* § 4467, at 638.

40. *Id.* at 648.

41. *Id.* § 4403, at 14.

42. *See id.*; *id.* at 21. "Economy of the time of the courts is one of the obvious beneficial results of the doctrine, *and this feature becomes increasingly important as work crowds more and more on our overburdened tribunals . . .*." Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929) (emphasis added) (yes, 1929!).

43. Thus, he refers interchangeably to the "core of full faith and credit," E. COOPER, *supra* note 36, § 4467, at 628, and the "core of res judicata." *Id.* at 630.

For discussion of a similar phenomenon in connection with the recognition of internationally foreign judgments, see Burbank, *Sources*, *supra* note 1, at 1582-87.

44. *See supra* notes 17 & 18; *supra* text accompanying note 24.

45. *See supra* note 33 and accompanying text; A. VON MEHREN & D. TRAUTMAN, *supra* note 30, at 1458-66. Although observing that "[o]ne purpose of the Full Faith and Credit Clause is to bring an end to litigation," Justice White confirmed that "[p]erhaps [its] major purpose . . . is to act as a nationally unifying force." Thomas v. Washington Gas Light Co., 448 U.S. 261, 288-89 (1980) (White, J., concurring).

to coordinate the administration of justice among the several independent legal systems which exist in our Federation."[46] Presumably, it is the latter policy that leads Professor Cooper to acknowledge the wisdom of requiring F2 to follow F1's preclusion rules that, although not part of the "core," nevertheless implicate F1's power to control its own procedures.[47] He should not stop there.

Consider again the example of nonmutual issue preclusion used by Professor Cooper as one illustration of rules far from the core that F2 should not be required to follow. F1 permits nonmutual issue preclusion; according to Professor Cooper, F2 should be "free to assume the costs of relitigation."[48] He reaches that conclusion by discounting for full faith and credit purposes the policy of reducing "the public costs of litigation," and by disparaging the "fear of inconsistency."[49] He also fails to consider the interjurisdictional implications of the fact that, as he recognizes in the domestic context, "once the rules of nonmutual preclusion are established they may generate substantial consequences of repose."[50]

Preclusion policies aside, Professor Cooper does not attempt to reconcile his view that F2 should be permitted to relitigate with the federal full faith and credit policy of unifying the several states. The abolition of mutuality encourages attempts to settle legal issues affecting many persons in one proceeding.[51] Having incurred substantial costs incident to such an attempt, F1 is not likely to be mollified by the argument that F2 will bear the costs of relitigation,[52] or to agree with the notion that the policy stakes are limited to its "timorous fears of being proved wrong."[53]

Finally, even if the Supreme Court of the United States adopted Professor Cooper's proposal to limit F2's full faith and credit obligation, the exception or exemption seemingly would not apply here. Granted that New

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46. Jackson, *supra* note 28, at 2. *See id.* at 21-34 ("Legislative Power Better to Integrate Our Legal Systems").

47. *See* E. COOPER, *supra* note 36, § 4467, at 625, 636, 644. *Cf. id.* at 647-48 (greater preclusive effect).

48. *See supra* text accompanying note 38.

49. *See* E. COOPER, *supra* note 36, § 4465, at 617.

50. *Id.* § 4403, at 16. "Not only may nonparties breathe freer, they may direct their future conduct according to the results of an adjudication between strangers." *Id.* at 16-17.

51. *See, e.g.*, Friends for All Children, Inc. v. Lockheed Aircraft Corp., 497 F. Supp. 313 (D.D.C. 1980), *rev'd*, 658 F.2d 835 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982).

52. *Cf.* Thomas v. Washington Gas Light Co., 448 U.S. 261, 293 (1980) (Rehnquist, J., dissenting) ("Otherwise . . . Virginia's efforts and expense on an applicant's behalf are wasted when that applicant obtains a duplicative remedy in another State.").

53. *See supra* text accompanying note 38.

Jersey's broad mandatory party joinder scheme is unusual, if not unique, and might not be thought part of the core,[54] the referent for the full faith and credit obligation is the law applied in F1. In *MortgageLinq* and my hypothetical variant involving a state court judgment, the law of F1 is the traditional rule of no preclusion with respect to persons not made parties. Tradition may not be determinative of status for these purposes. Yet, consideration of Professor Cooper's proposal reminds us that *the effect of applying the Entire Controversy doctrine to parties is to preclude claims*.[55] In any event, as we shall see, adherence to F1's rules may be necessary to preserve its power to control its own procedures.

With these possible avoidance techniques out of the way, we may now turn to two more formidable arguments that might save New Jersey from violation of federal law.

C. Greater Preclusive Effect

The paradigmatic full faith and credit violation occurs when a state gives less preclusive effect to the judicial proceedings of another state than they would be given in the courts of the state from which they are taken. Historically, the concern was that some states were either ignoring, or allowing the ready impeachment of, money judgments secured in other states.[56] For an example that captures modern developments in preclusion law, assume that F2's domestic preclusion law still permits a person injured in an automobile accident to sue the same defendant separately for damages to the person and damages to property, while F1 follows the modern approach and does not permit such splitting.[57] F2 would violate the full faith and credit statute if it permitted a suit for property damage against the same defendant whom the plaintiff had previously sued for personal injuries in F1.

My hypothetical variant of *MortgageLinq* is different in that, if New Jersey were permitted to apply its domestic law—the Entire Controversy doctrine—the result would not be less preclusive effect but greater

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54. *But see* E. COOPER, *supra* note 36, § 4467, at 641 ("procedural desire to frame comprehensive litigation in the initial forum . . . deserves full faith and credit support"); *id.* at 643 (arguing for obligation to respect compulsory counterclaim rule of another state "since the purpose of such rules is not only procedural convenience for the first court but also to gain the repose values inherent in settling all related accounts between the parties").

55. *See supra* note 31 and accompanying text.

56. *See, e.g.*, Nadelmann, *supra* note 25.

57. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-25 (1982).

preclusive effect. The plaintiff would be precluded from suing in F2 parties he could sue in F1.

If the only policies underlying full faith and credit were the policies of domestic preclusion law, it would be difficult to locate the harm, and hence difficult to conclude that there had been a violation of federal law, in this situation.[58] Some scholars have been down this road, reasoning that there is no federal barrier to greater preclusive effect.[59] In my view, however, the arguments are ultimately unpersuasive whether the rule of greater preclusive effect they support is broad or narrow in scope.[60]

The First Congress chose to give content to the constitutional obligation not by requiring F2 to apply the law that would be applied in F2,[61] but by requiring F2 to apply the law that would be applied in F1.[62] Disregarding implications of the statutory command to give the "*same* full faith and

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58. "After all, if the recognizing jurisdiction's law calls for preclusion, the shared goal of putting an end to litigation will be served, and the rendering jurisdiction will have no complaint." Burbank, *Sources*, *supra* note 1, at 1585 (footnote omitted).

59. *See, e.g.*, Eugene F. Scoles, *Interstate Preclusion by Prior Litigation*, 74 Nw. U. L. REV. 742, 749-53 (1979); David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 326-27 (1978). Professor Currie also considers counter-arguments.

60. Professor Cooper, whose discussion of this problem is linked to his discussion of "core" rules and policies, would permit some scope for greater effect, depending upon the precise question. *See* E. COOPER, *supra* note 36, § 4467, at 644-48. Professor Cooper has since acknowledged that "[r]ecent Supreme Court decisions dealing with the effect of state court judgments in federal litigation strongly suggest that the full faith and credit statute forbids a second court from giving greater preclusive effect than would be given by the court that rendered the judgment." *Id.* at § 4467, at 454 (Supp. 1996).

61. "Without more, it would be reasonable to argue that all of the nationalizing purposes of full faith and credit could be served by requiring a second state to honor judgments from other states by direct enforcement and by affording the same res judicata protections as arise from its own judgments." *Id.* at § 4467, at 637.

62. For analysis and discussion of the theoretical and practical differences between this formulation and the erroneous interpretation of the statute in recent decisions of the Supreme Court, whereby F2 is directed to apply the domestic preclusion law of F1, see Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 797-829; Burbank, *Sources*, *supra* note 1, at 1556-71.

credit" in F2 as would be given in F1,[63] there has never been any basis in the statute's language for construing the obligation as a one way street.[64]

Numerous Supreme Court opinions, both old and new, in dictum and holding, oppose the notion that F2 is free to give greater preclusive effect.[65] Included among the more recent statements to that effect is a concurring opinion by Justice White expressing the wish that it were possible to give greater preclusive effect, but the conviction that it was foreclosed by the "long standing" "contrary construction of § 1738."[66]

The Court's construction is supported by considerations relating to the statute's integrative role.[67] Party joinder rules reflect adjustments among policies that may be in tension, if not in conflict. They are policies that relate to efficient adjudication, fairness, and party autonomy.[68] The rule on necessary and indispensable parties, in particular,

> is administered against the background of an often unstated but very important premise: Persons suffering similar injuries ordinarily do not have to join in seeking to redress their injuries through litigation, and an injured person is ordinarily not required to bring suit against all who might be liable for the injury. The "plaintiff autonomy" premise is the point of departure for the necessary parties rule.[69]

Whatever policies animate them, party joinder rules are considered and relied on by prospective plaintiffs before commencing litigation, and by those who have been made parties when considering subsequent moves. When making these calculations, parties advised by competent attorneys

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63. The implications *should* be disregarded because the changes made to yield this language in 1948 were called "[c]hanges . . . in phraseology." H.R. REP. NO. 80-308 (1st Sess.) at A150 (1947). Moreover, "[t]he addition of 'full' can narrow down the command. To the extent that the Full Faith and Credit clause is self-executing, any such narrowing down would have to be discarded as in contravention of the command by the Constitution." Nadelmann, *supra* note 25, at 83.

64. *See supra* note 26.

65. *See, e.g.*, Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985); Union & Planters' Bank v. Memphis, 189 U.S. 71 (1903); Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 803-04.

66. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 88 (1984) (White, J., concurring).

67. *See supra* text accompanying note 45.

68. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE ch. 10 (4th ed. 1992) [hereinafter F. JAMES ET AL.].

69. *Id.* § 10.12, at 528 (footnote omitted).

consider the preclusive consequences that party joinder decisions may entail, just as they consider such matters in connection with decisions about the joinder of claims. Thus, tying the federal obligation to the preclusive effects in F1 is essential from the point of view of predictability. "From the perspective of litigants . . . a system of preclusion rules . . . keyed to the locus of subsequent litigation would be hopeless, either because it would be unpredictable or because it would be, functionally, a sham."[70]

To permit New Jersey, as F2, to preclude where F1 would not do so might advance the preclusion policies of New Jersey. It could hardly be thought, however, to further the goal of unifying the several states. The concern is not so much, and certainly not only, possible offense to F1 from New Jersey's failure to adhere to F1's solution. When F2 gives greater preclusive effect, it may impose concrete costs on F1.[71]

By precluding a plaintiff from suing defendants that had been omitted from a prior lawsuit in F1, which permitted but did not require their joinder and would not bar a second lawsuit, New Jersey as F2 could effectively deprive F1 of the ability to control its own procedures. Such a regime could shape future behavior[72] by making the party joinder rules of New Jersey the basis for litigation strategy decisions in F1. The risk would be greatest with respect to those for whom F2 was, or was feared to be, the only other available, or practical, venue and for whom the disadvantages of two suits (as opposed to one) in F1 exceeded the advantages.[73]

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70. Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 797 (footnote omitted).

> Does not, however, the issue become whether the purposes underlying full faith and credit are exhausted in accommodation of potentially conflicting policies of the sister states concerned or whether these purposes, even in the absence of actual or potential conflict, call for solutions that facilitate multistate activity and minimize the dislocations arising from the existence of state boundaries?

A. VON MEHREN & D. TRAUTMAN, *supra* note 30, at 1459.

71. "A rule of greater preclusive effects, once known, could have a consequential impact on the conduct of the initial litigation, as risk-averse parties treat what should have been a local skirmish as if it were a world war. This escalation would impose unwanted costs on [F1]." Burbank, *Sources*, *supra* note 1, at 1585. *See also* Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 312 (1993).

72. "To determine whether a rule is beneficial, a court must examine how that rule influences future behavior." Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc., 814 F.2d 358, 366 (7th Cir. 1987).

73. Considering the implications of applying New Jersey's Entire Controversy doctrine to determine the preclusive effects of a sister-state judgment, the Court of Appeals for the Third Circuit observed:

> We note at least the theoretical possibility that such a holding might compel careful litigators in other jurisdictions to raise all related claims and issues and seek all

It might be argued that there is no imposition on F1 or sacrifice of its policy preferences—that, more colloquially, F1 should not care—because its own rules contemplate that a related lawsuit can be brought there. I do not find the argument persuasive. First, as just suggested, a litigant for whom two suits, one in F1 and the other elsewhere, would be preferable to one in F1 may nonetheless prefer one suit if the only alternative is two in F1. If so, F1's preference for party autonomy[74] would be sacrificed. Second, F1 may take the view that in such matters litigant preferences are also the best measure of efficiency.[75] If so, F1's view of efficient adjudication would be sacrificed. Third, and more controversially, F1's rules on this subject may reflect the expectation that, at least in some instances, F1 will not have to bear all of the costs of dispute resolution that could result from leaving wide scope to party autonomy, because parties will choose to pursue additional litigation in other jurisdictions. If so, F1's expectations would be frustrated.

D. Preclusion in New Jersey "Without Prejudice"

If New Jersey is not normally free to give greater preclusive effect, the only remaining avoidance technique is one that has also been suggested by Professor Cooper, whereby F2 bars litigation in its own courts but without prejudice to litigation elsewhere.[76]

There would be little profit in dwelling on the reasoning behind the New Jersey supreme court's conclusion that the trial court had erred in dismissing the plaintiff's complaint with prejudice, even though the Entire Controversy doctrine barred further litigation by the plaintiffs in New Jersey against the defendants omitted in their federal action in Pennsylvania. There is irony in the use made by the court of its prior decision in *Watkins v. Resorts*

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available remedies in a single proceeding, because of the possibility that a subsequent claim might arise in New Jersey. In this way, New Jersey would be imposing on litigants and courts in other states its policy choice to encourage parties to litigate all claims, defenses, issues, and remedies related to a particular transaction.

Electro-Miniatures Corp. v. Wendon Co., Inc., 889 F.2d 41, 45 n.6 (3d Cir. 1989).

74. *See supra* text accompanying note 69.

75. *See* F. JAMES ET AL., *supra* note 68, § 9.8, at 482-83; § 10.11, at 525-26.

76. Where F1 retains the requirement of mutuality and the question is

> a defendant's efforts to preclude a plaintiff, the second court probably should be free to dismiss a second action so as to protect its own interests in avoiding repetitive litigation. It should not be free to enter judgment on the merits for the defendant so as to preclude an action in another court.

E. COOPER, *supra* note 36, § 4467, at 648. *See also* Lilly, *supra* note 71, at 307-08.

International Hotel and Casino, Inc.[77] The court borrowed some of *Watkins'* technical apparatus, but not its sensitivity to interjurisdictional obligations.[78] The teleological nature of the conclusion "that a dismissal for failure to comply with the entire controversy doctrine is more similar to a threshold adjudication than to an adjudication on the merits"[79] is plain.

It may be that the supreme court of New Jersey responded as it did to the second question posed in *MortgageLinq*—"what is the effect of . . . preclusion [in New Jersey] in other jurisdictions?"[80]—precisely to avoid the conclusion suggested by full faith and credit analysis. The court was seeking to justify the application of its own (F2) law in the face of serious objections.[81] In its haste to accomplish that, the court failed to mark any distinction among dismissals based on the Entire Controversy doctrine. As a result, a dismissal for failure to join claims might be treated similarly, and the same rule of non-preclusion outside of the New Jersey state courts would apply if New Jersey were F1 (or both F1 and F2, with the question arising in F3).[82]

It remains to determine whether limiting the effects of F2's more broadly preclusive rule to F2 obviates any full faith and credit problems that would otherwise exist. I conclude that two wrongs do not make a right. New

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77. 124 N.J. 398, 591 A.2d 592 (1991).

78. *See MortgageLinq*, 142 N.J. 336, 345-48, 662 A.2d 536, 541-42 (1995).

79. *Id.* at 347, 662 A.2d at 542.

80. *See supra* text accompanying note 15.

81. "Although the majority precludes plaintiffs from suing in the [New Jersey] state courts, it leaves them free to pursue a second action in the federal courts. To achieve this result, the majority characterizes a state court dismissal based on the entire-controversy doctrine as one without prejudice." *MortgageLinq*, 142 N.J. at 354-55, 662 A.2d at 545 (Pollock, J., dissenting).

82. *See id.* at 347-48, 662 A.2d at 542. The court's initial statement and defense of its holding is limited to the "preclusive effect to our rules of party joinder." *Id.* at 338, 662 A.2d at 537. Otherwise, the only qualification noted by the court appears to be based on an erroneous premise. Thus, the court suggested that the question of preclusion in a diversity action in New Jersey federal court as F2 might be governed by "choice-of-law principles." *Id.* at 347-48 n.4, 662 A.2d at 542 n.4 (cross-referencing Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958)). As Professor Degnan made clear, the case (assuming a judgment in the "prior state court action in New Jersey") is governed by the full faith and credit statute, not the jurisprudence of *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. *See* Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 750-55 (1976); Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 735. *Compare infra* text accompanying note 165 (no judgment). For a recent decision proceeding from the same erroneous premise, where the initial action was brought and went to judgment in New York state court, see *Itzkoff v. F & G Realty of New Jersey Corp.*, 890 F.Supp. 351 (D.N.J. 1995).

Jersey cannot satisfy its federal obligation as F2 by making it impossible for other states to satisfy theirs as F3. Put another way, New Jersey cannot satisfy its federal obligation by transferring it to other jurisdictions.

In the course of its decision in *MortgageLinq*, the New Jersey supreme court observed that "fairness to the system of judicial administration," was, with "fairness to the parties," "[o]ne of the underpinnings of the entire controversy doctrine."[83] The court went on to assert that "[e]ach jurisdiction is free to assess the importance of such values."[84] As a result, according to the court:

> If Pennsylvania courts do not have a comparable party-joinder rule, principles of comity suggest that New Jersey should not seek to export its entire controversy doctrine to regulate the conduct of attorneys in that jurisdiction. In other words, *attorneys conducting litigation in Pennsylvania courts should not have to accommodate their practices to the demands of New Jersey courts*. A corollary of that proposition, however, is that New Jersey courts need not necessarily grant relief when parties deliberately refrain from seeking relief in other jurisdictions when doing so would have been much fairer to all parties involved.[85]

Once it had found a way to implement this view of interjurisdictional interests, the court sought comfort in the proposition that "[m]aintaining a cohesive federal system (and the Full Faith and Credit Clause melds the state courts into that system) does not require that the other parts of the federal system honor our entire controversy doctrine."[86]

These are not choices for New Jersey to make. A literal approach to the full faith and credit statute affords no more warrant for this departure by F2 from the preclusive effects that would be given in F1 than for the more drastic departure that dismissal with prejudice would portend.[87] Moreover, eminent scholars long ago identified the failure to grasp that full faith and credit is a national policy as a major vice of the Supreme Court's decision in

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83. *MortgageLinq*, 142 N.J. at 344, 662 A.2d at 540.

84. *Id.* at 345, 662 A.2d at 540.

85. *Id.*, 662 A.2d at 541 (emphasis added).

86. *Id.* at 348, 662 A.2d at 542.

87. *See supra* note 18. Note that the regime favored by Justice White, but which he concluded was foreclosed by precedent, *see supra* text accompanying note 66, would have permitted federal courts to apply their own, more broadly preclusive rules, "the parties then being free to relitigate in the state courts." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 88 (1984) (White, J., concurring).

Industrial Commission of Wisconsin v. McCartin.[88] The result is that a state has no business seeking to control the interjurisdictional effects of the judgments of its courts.[89] As of 1980, a majority of the Court recognized the problem, although *stare decisis* caused them to struggle for a solution.[90] Precedent does not get in the way of clear thinking here.[91]

The choice of the preclusive effects in F1 as the measure of the federal obligation has an advantage that is set in relief by *MortgageLinq*. Under current law, states in the position of F2 are required only to do what the courts of F1 would do, a technique that furnishes an inner political check against self-regarding behavior. The court in *MortgageLinq*, to the contrary, has used (an unauthorized version of) interjurisdictional preclusion law to export litigation costs, laying down one rule for New Jersey and washing its

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88. 330 U.S. 622 (1947).

89. Full faith and credit is a national policy, not a state policy. Its purpose is not merely to demand respect from one state for another, but rather to give us the benefits of a unified nation by altering the status of otherwise "independent, sovereign states." Hence, it is for federal law, not state law, to prescribe the measure of credit which one state shall give to another's judgment.

Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 161-62 (1949). *See also* A. VON MEHREN & D. TRAUTMAN, *supra* note 30, at 1459; Elliott E. Cheatham, *Res Judicata and the Full Faith and Credit Clause:* Magnolia Petroleum Co. v. Hunt, 44 COLUM. L. REV. 330, 338-41 (1944).

90. *See* Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); *id.* at 290 (Rehnquist, J., dissenting). Professor Dane's elegant commentary brings to mind a remark attributed to his former colleague, the late Leon Lipson: "Anything you can do, I can do meta." *See* Perry Dane, *Sovereign Dignity and Glorious Chaos: A Comment on the Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 RUTGERS L.J. 173 (1996). But Professor Dane is admirably candid about his disagreement with the imputed premises, and much of the law, of full faith and credit. *See id.* at text accompanying notes 4, 10, 31. As a result, his article also calls to mind the battles waged in *Thomas* and earlier cases for the soul of full faith and credit. Unfortunately for Professor Dane, those who favored the assimilation of "judicial proceedings" to "laws" for purposes of federal control lost the war. Fortunately for the rest of us, we do not need to suffer the costs of interjurisdictional "anarchy," *id.* text accompanying note 29, to which Professor Dane, as a choice of law scholar, has become accustomed.

91. I do not regard as pertinent here the Supreme Court's fumbling in cases involving the interplay of full faith and credit and exclusive federal subject matter jurisdiction. In speculating about the content of "state law" on a question that a state court can never address, the Court has twice invoked rules or approaches that should have been irrelevant because they were interjurisdictional. *See* Matsushita Elec. Indus. Co., Ltd v. Epstein, 116 S. Ct. 873 (1996); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 383 (1985). For discussion, see Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 824-25.

hands of possible sequelae in other jurisdictions. So much for full faith and credit as a nationally unifying force.[92]

Finally, those who are nonetheless attracted to the *MortgageLinq* solution because it appears functionally to respect the interests of both F1 and F2 should reconsider. As a practical matter, the supposed benefits of mutual accommodation sought by the New Jersey supreme court can be realized, and the cost of depriving F1 of the power to control its own procedures discussed above can be avoided, only if there are, or are thought to be, adequate alternatives to New Jersey for subsequent litigation.[93] Passing other potential barriers to suit, there is nothing to prevent other states from taking the same position as F2 and thus, in theory at least, nothing to prevent the number of additional forums available as F2 from shrinking to zero.[94] The content of the federal obligation should not depend upon such contingencies and calculations.[95]

E. Relaxing the Assumptions

1. Federal Court as F1

MortgageLinq in fact involved the preclusive effects to be given the judicial proceedings of a federal court. Although the New Jersey supreme court did not pause over any impact that might have on its analysis, the reason may be that, in the *Watkins* decision on which it relied in other

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92. Although the New Jersey supreme court does not purport to dictate a rule for other jurisdictions to follow, its approach might well encourage similarly self-regarding behavior elsewhere. *See infra* text accompanying note 94.

The *MortgageLinq* court also exported what it claims is unfairness to parties, further revealing its "without prejudice" solution as a self-inflicted wound whether New Jersey is F2 or F1. *See infra* note 152.

I leave to others the question raised by Professor Lilly, "[w]hether this 'door-closing' posture is immune from a constitutional attack based on the argument that f-2 is unfairly discriminating against f-1's law." Lilly, *supra* note 71, at 308.

93. *See supra* text accompanying notes 72-73. Recall that the *MortgageLinq* court acknowledged that "attorneys conducting litigation in Pennsylvania courts should not have to accommodate their practices to the demands of New Jersey courts." *MortgageLinq*, 142 N.J. at 345, 662 A.2d at 541.

94. *See supra* note 92 and accompanying text. Again, I do not regard it as an adequate answer that the related action can be brought in F1. *See supra* text accompanying notes 74-75.

95. *See* A. VON MEHREN & D. TRAUTMAN, *supra* note 30, at 1459 (*quoted supra* note 70). On this view, the *MortgageLinq* plaintiffs' second federal lawsuit, *see supra* text accompanying notes 12 and 14, should be dismissed on proper motion.

respects,[96] the court had explored the question in detail. In any event, because the scholarly literature already covers the ground, we need not pause long over this aspect of the case.

a. Federal Question Judgment

The action brought in Pennsylvania federal court (F1) involved both state and federal claims.[97] Still assuming that it went to judgment before the New Jersey trial court (F2) ruled on the motions to dismiss, the latter was not free to disregard the judgment. For, although neither Article IV of the Constitution nor the full faith and credit statute applies to the judicial proceedings of federal courts, an obligation to respect them, equivalent in force and effect to full faith and credit, is found elsewhere in federal law.[98]

To say that federal law requires a state court as F2 to respect federal judicial proceedings is not to say what law furnishes the measure of that respect. However, the decisions of the United States Supreme Court indicate, and analysis supports the conclusion, that federal preclusion law governs the effects of the federal question judgment of a federal court.[99] This federal law subsumes, to the extent that it implements, the basic federal obligation of respect[100] and is binding on state courts under the supremacy clause[101] in the sense that it preempts any inconsistent state law.

Federal preclusion law would not have barred the plaintiffs in *MortgageLinq* from suing the New Jersey defendants in federal court (which is of course precisely what they attempted to do after the trial court dismissed their New Jersey case).[102] The only justification I can imagine for permitting preclusion in New Jersey would be the notion that according greater preclusive effect evinces no disrespect of, and portends no adverse impact on, federal courts or the policies underlying federal law. In other words, the notion would be that barring suit against the New Jersey defendants in New Jersey state court would not be inconsistent with federal

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96. Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 591 A.2d 592 (1991). *See supra* text accompanying notes 77-78.

97. *See MortgageLinq*, 262 N.J. Super. 178, 182, 620 A.2d 456, 457.

98. *See* Burbank, *Interjurisdictional Preclusion, supra* note 1, at 740-47.

99. *See, e.g.*, Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 324 n.12 (1971); Stoll v. Gottlieb, 305 U.S. 165 (1938); Deposit Bank v. Frankfort, 191 U.S. 499 (1903); Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 762-78.

100. *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 746.

101. U.S. CONST. art. VI, cl. 2.

102. *See supra* text accompanying note 12.

law. The same analysis that casts doubt on that proposition for purposes of full faith and credit applies here.[103]

b. Diversity State Law Judgment

A more difficult problem of interjurisdictional preclusion would have been presented if the federal case in F1 had been a diversity state law action. Although some courts and commentators, including perhaps the New Jersey supreme court in *Watkins*,[104] take the view that federal preclusion law also and always governs the interjurisdictional effects of a federal judgment in this situation, more careful analysis demonstrates that some questions are governed by federal, and some by state, preclusion law.[105]

How should New Jersey as F2 treat a federal diversity judgment adjudicating matters of state law for purposes of party joinder and the Entire Controversy doctrine? In order to answer the question, it may be helpful to imagine—because it suggests starkly different preclusion regimes—that the federal court (F1) sits in New Jersey and that the governing substantive state law is New Jersey law. On these assumptions, differences in the preclusion law applicable to such a case could materially affect the character or result of the litigation, as they could affect the choice of forum.

If that were all, the Supreme Court's decisions regarding the allocation of federal and state lawmaking power[106] would strongly suggest that state preclusion law (the Entire Controversy doctrine) furnished the measure of respect due the federal diversity judgment.[107] This law would also be binding on a state court as F2 under the mantle of the supremacy clause.

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103. *See* discussion *supra* parts III.C-D.

104. *See* Watkins v. Resorts Int'l Hotel and Casino, Inc., 124 N.J. 398, 411, 591 A.2d 592, 598 (1991); Degnan, *supra* note 82, at 755-73.

105. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 87 cmt. b (1982); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 95 cmt. h (1988 rev.) ("When a federal judgment adjudicates claims under State law, State law, as a matter of federal law, may determine the effects of the judgment."); Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 778-97.

106. *See* Walker v. Armco Steel Co., 446 U.S. 740 (1980); Hanna v. Plumer, 380 U.S. 460 (1965).

107. It is true that preclusion rules are not made by, and do not have their ultimate bite in, the rendering court. But in fashioning preclusion rules for federal judgments, federal courts are bound by federal statutes, including the Rules of Decision Act and federal jurisdictional statutes. The purpose of the enterprise is precisely to determine the law that will attend a federal diversity judgment and that will bind all courts, federal and state, in which the judgment is subsequently raised. Once that law is ascertained, it will not only furnish the rules prescribing the ultimate bite, but it may also affect the conduct of litigation in the rendering court.

There is more, however. The Federal Rules of Civil Procedure do not, and cannot validly, provide rules of preclusion, but they can validly influence the creation or application of federal common law.[108] It is difficult to make a persuasive argument for federal preclusion law on the basis of emanations from the Federal Rules when the question is the joinder of claims, because it is difficult to tease a pertinent federal procedural policy from Rule 18.[109] The case for federal common law is stronger when the question is joinder of parties. For parties, unlike claims, the Federal Rules lay down both the maximum scope of joinder[110] (the ceiling) and the minimum scope[111] (the floor).

Particularly when juxtaposed with Rule 20,[112] Rule 19 can plausibly be regarded as a statement of federal policy concerning the extent to which it is appropriate for a federal trial court to override party autonomy.[113] If so, that policy would be frustrated by application of state preclusion law that more tightly constrained party autonomy (by requiring more expansive party

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> As Professor Degnan recognized, albeit in a different context, "[i]f 'outcome determinative' is the relevant test . . . hardly anything is more dispositive than the doctrine of *res judicata*."

Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 785-86 (footnote omitted). *See also* Lilly, *supra* note 71, at 315, 322, 327.

108. *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 772-75, 792, 795. *See also* Lilly, *supra* note 71, at 320-21.

109. "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party." FED. R. CIV. P. 18(a).

"'May' as used in Rule 18(a) does not mean 'shall.' 'Shall' in this context is beyond the competence of the Federal Rules, and 'may' juxtaposed with 'shall,' [in Rule 13(a)] even if unauthorized, is a particularly feckless vehicle of policy." Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 792.

110. FED. R. CIV. P. 20.

111. FED. R. CIV. P. 19.

112. Rule 20 provides in pertinent part that:

> [a]ll persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action.

FED. R. CIV. P. 20(a).

113. *See* FED. R. CIV. P. 19; *supra* note 74 and accompanying text. *See also* Temple v. Synthes Corp., Ltd., 498 U.S. 5 (1990) (per curiam). "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit . . . . Nothing in the 1966 revision of Rule 19 changed that principle." *Id.* at 7.

joinder), since the content of the governing preclusion law would affect trial strategy in the initial action.[114] Perhaps that should be sufficient reason to apply federal preclusion law, or at least to preempt state law on the question.[115]

2. No Judgment in F1

When the trial court in *MortgageLinq* granted the motions to dismiss under the Entire Controversy doctrine, the plaintiffs' federal case in Pennsylvania had not yet gone to judgment.[116] At first blush, this fact may seem to toll the thirteenth hour on the analysis to this point, casting doubt on all that comes before. Even if the New Jersey supreme court reached the right result, however, the court made nothing of this aspect in answering the first question posed, and the point is irrelevant to the second question.[117] In addition, it is not as clear as it may first appear to be that the pendency of the action in the trial court in F1 changes the result. It may be helpful to proceed by resuscitating the other assumption initially made about F1, and then relaxing that assumption.

a. State Court as F1

Neither the full faith and credit clause of the Constitution nor the full faith and credit statute by its terms requires that there be a judgment in F1 before the obligation it imposes on F2 attaches. Both speak of "judicial proceedings."[118] But the tendency to equate "judicial proceedings" and "judgment" is natural, if only because the protection of sister state court judgments was the central concern of the framers and the members of the first Congress.[119] However, that was not their only concern.

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114. For these purposes there is no need to be concerned about the locus of subsequent litigation, because, once determined, the governing law, state or federal, will be known in advance of the federal diversity action in F1. *Compare supra* text accompanying notes 72-75 and 93-95.

115. *Cf.* Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 795 (compulsory counterclaims).

116. *See supra* note 9.

117. *See supra* text accompanying notes 15 and 22.

118. *Supra* notes 17 and 18.

119. *See supra* note 25 and accompanying text.

proceedings" was thought to be broader than "judgment."[120] Moreover, the Supreme Court recently recognized that a judgment is the product of "judicial proceedings" rather than a synonym for them.[121]

A literal reading of the full faith and credit statute would require F2 to preclude litigation that would be barred in F1 because "judicial proceedings" were already pending there. For instance, if F1 followed the domestic law doctrine variously known as "other action [or suit] pending" or "prior pending action,"[122] this reading of the statute would make that doctrine binding "in every court within the United States and its Territories and Possessions."[123]

The notion may strike some as bizarre. The tradition that no bar arises from the pendency of identical lawsuits in state courts or in state and federal court suggests, if it does not require, the conclusion that there is no federal full faith and credit obligation to abate the lawsuit in F2, even though it would be abated in F1.[124]

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120. *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 483-89 (rev. ed. 1937); Nadelmann, *supra* note 25, at 58-59. *See also* Walter W. Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 429 (1919) (arguing that "judicial proceedings" in Article IV includes original process); Edward S. Corwin, *The "Full Faith and Credit" Clause*, 81 U. PA. L. REV. 371, 388 (1933) (assumption that "judicial proceedings" refers only to judgments seems "to be groundless").

121. "The judgment of a state court in a class action is plainly the product of a 'judicial proceeding' within the meaning of §1738 . . . ." Matsushita Elec. Indus. Co., Ltd. v. Epstein, 116 S. Ct. 873, 878 (1996).

122. *See, e.g.*, Sutcliffe Storage and Warehouse Co., Inc. v. United States, 162 F.2d 849, 851 (1st Cir. 1947); Oliney v. Gardner, 771 F.2d 856, 859 (5th Cir. 1985); Allan D. Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960).

123. 28 U.S.C. § 1738 (1996). "[T]here are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the 'full faith and credit' clause." Corwin, *supra* note 120, at 388.

124. *See, e.g.*, Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976); McClellan v. Carland, 217 U.S. 268, 282 (1910); E. COOPER, *supra* note 36, § 4404, at 23.

> But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become

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Yet, there is nothing inevitable about this result. Indeed, some early cases suggested that full faith and credit might be interpreted to nationalize a domestic "other action pending" defense.[125] History went the other way,[126] to the point that an amendment of the statute may be necessary to change the law. But Congress had no problem barring duplicative simultaneous litigation in the child custody area, and its action in that regard may be further support for the proposition that at least the "judicial proceedings" referred to in the Constitution need not have culminated in a judgment.[127]

Is it necessarily true, then, that if F1 in *MortgageLinq* had been a state court, New Jersey as *F2* would not have violated federal law by barring suit against omitted defendants prior to judgment in F1? The traditional view regarding parallel actions in different states strongly suggests if New Jersey had been *F1* and no judgment had been entered, full faith and credit would not have required another state as F2 to abate even though the courts of New Jersey would do so. Are there differences between the two situations that might support different results under the full faith and credit statute?

The conclusion that there is no violation of the full faith and credit statute if F2 entertains litigation that would be barred in F1 because of another action pending can usually be justified by reference to the rules and policies of domestic preclusion law.[128] Pendency of the action in F1 usually

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generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

Kline v. Burke Constr. Co., 260 U.S. 226, 230 (1922).

125. *See, e.g.*, Hart v. Granger, 1 Conn. 154 (1814); Vestal, *supra* note 122, at 528-30.

126. *See, e.g.*, Stanton v. Embrey, 93 U.S. 548, 554 (1877).

127. A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

28 U.S.C. § 1738A(g) (1996).

Although this is not a necessary inference (because the statute can be justified on other grounds), it is evidence against the assertion that "[t]he essential characteristic of 'judicial proceedings' within the meaning of the full faith and credit clause is the property of being *res judicata*." Albert S. Abel, *Administrative Determinations and Full Faith and Credit*, 22 IOWA L. REV. 461, 516 (1937). In any event, the author's assertion is unsupported by reasoning and appears a transparent attempt to ease the way for full faith and credit to administrative determinations.

128. That is not because preclusion is the central federal policy; it is rather the area of concern that led to Article IV and the implementing statute, which have a broader policy. *See supra* text accompanying notes 45-46.

signifies that no domestic rule of preclusion is applicable, which in turn means that in F1 the policies of finality, repose and reliance are not sufficiently implicated to require protection.[129]

To be sure, a domestic "other action pending" or "prior pending action" defense can be thought to protect some of the same interests, in particular the interest of litigants in freedom from harassment. To the extent, however, that such a defense is designed to protect F1's judicial resources, they require no protection if F2 is a court in another state or a federal court. Moreover, there are other interests, including those of F2, at stake.

It would not be irrational for Congress to conclude that duplicative litigation is a sufficiently serious national problem to warrant overriding the interests at stake in the litigation in F2 prior to judgment in F1 (at least if F1 would then bar such litigation). But keeping in mind the problems that brought forth the constitutional provision, neither was it irrational for courts to fail to impute that interpretation to its implementing statute.

A judgment is not, however, an infallible marker for the existence of full faith and credit concerns. It is not even a reliable prerequisite for preclusion in domestic law.

The first test of the proposition that there can be no violation of the full faith and credit statute unless there is a judgment in F1 comes as a result of developments in modern issue preclusion law. There is authority for the rule that in some circumstances a finding can be given preclusive effect before there is a judgment. This approach gives finality a different meaning for issue preclusion purposes than it has for claim preclusion purposes.[130] If F1 has adopted this rule, surely it is too facile to let F2 off the hook by insisting that "judicial proceedings" means "judgment."[131] For, here both the domestic preclusion law of F1 and the broader full faith and credit policy of unifying the country support requiring F2 to follow F1.[132]

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129. "Judicial actions must achieve a basic minimum quality to become eligible for res judicata effects. The traditional words used to describe this quality require that there be a judgment that is valid, final, and on the merits." E. COOPER, *supra* note 36, § 4427, at 269.

130. *See* Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982).

131. *But see* E. COOPER, *supra* note 36, § 4467, at 643. "More conservative courts should be free to litigate the same issues—here, if nowhere else, it seems clear that there is not yet any judgment, and the vague full faith and credit terminology of 'judicial proceedings' should not be expanded beyond judgments at this late date." *Id.*

132. *See supra* text accompanying notes 45-46. To the extent that according such preclusive effect were discretionary in F1, F2 would have the same discretion.

Attention to this broader policy suggests that there may be a relevant difference between my hypothetical variant of *MortgageLinq* and the case in which New Jersey is F1—the second test of the proposition. In the latter case, where it appears clear that another state's courts or a federal court would not be required to preclude, although New Jersey courts would preclude, prior to judgment,[133] the interests of New Jersey are captured in the policies that it has imputed to the Entire Controversy doctrine. To the extent that they are the policies of preclusion law, as discussed above, prior to judgment in New Jersey, they are not implicated to the degree necessary to require other states or the federal courts to surrender whatever interests may be at stake in the litigation filed there. Moreover, New Jersey's interest in protecting its judicial resources does not in this situation require federal protection.[134] Finally, there is little risk that the failure to require F2 to preclude prior to judgment will deprive New Jersey as F1 of the ability to control its own procedures. The fact that full faith and credit does require preclusion in F2 after judgment in F1[135] should prevent litigants from gambling on a rush to judgment in F2 by ignoring the Entire Controversy doctrine in F1.

When New Jersey is F2 the absence of a judgment in F1 does not eliminate the impact F2's application of the Entire Controversy doctrine may have, in future cases, on F1. The relevant decisions regarding litigation strategy in F1 will have been made long before the case is over, and the plaintiff may not be able to wait until the case is over to file in F2. If one believes that permitting New Jersey to apply the Entire Controversy doctrine as F2 would violate full faith and credit when there is a judgment in F1,[136] it is hard to defend a contrary result when there is not.

Reliance on tradition usually justifies the equation of "judicial proceedings" and "judgment." But there is no tradition on the duty of F2 to follow the latest development in F1's domestic preclusion law, and the tradition on the question of greater preclusive effect does not require the existence of a judgment in F1 for its intellectual support.[137] Perhaps for such cases we ought to read the statute literally in light of its dominant purpose. If we do that, New Jersey would violate full faith and credit by applying the

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133. Here I am disregarding New Jersey's attempt to deprive judgments enforcing its Entire Controversy doctrine of extra-territorial effect. *See supra* text accompanying notes 75-94; *infra* text accompanying note 146.

134. *See supra* text accompanying note 129.

135. *See infra* text accompanying note 150.

136. *See* discussion *supra* parts III.C-D.

137. *See* discussion *supra* part III.C.

Entire Controversy doctrine to preclude suit against parties omitted in an action in F1 even before that action went to judgment.

b. Federal Court as F1

Finally, we reach the case that was before the New Jersey supreme court in *MortgageLinq*. For these purposes we need not be concerned about the traditional interpretation of the full faith and credit statute, or about that statute at all. On the other hand, alternative explanations of the source of the obligation to respect federal judicial proceedings or of the law that governs the preclusive effects thereof do not provide nourishment if they must assume the existence of a judgment. Not all of them must do so.

Federal common law is the source of the obligation to respect federal judgments, as it is likely to be the source of any federal rule of preclusion defining the measure of respect that they are due.[138] The existence of pertinent and valid federal common law obviously does not depend generally on the existence of a federal judgment.[139] Moreover, preemptive federal law, which is a subset of federal common law,[140] is as legitimate when necessary to protect federal procedural interests as it is when necessary to protect federal substantive interests.[141]

The Federal Rules of Civil Procedure are not statutes, and mischief can follow from the assumption that they are.[142] The Federal Rules are, however, provided for by a federal statute[143] and should be treated as if they were statutes for the purpose of considering whether they justify the creation (or application) of federal common law.[144]

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138. *See supra* text accompanying notes 97-101.

139. *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 753-62, 783-91.

140. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 32-39 (1985); Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 808 n.360.

141. *See, e.g.*, Tullock v. Mulvane, 184 U.S. 497, 512-13 (1902).

142. *See* Stephen B. Burbank, *The Rule Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1102, 1177-78 (1982).

143. *See* 28. U.S.C. §§ 2072-74 (1994).

144. *See supra* text accompanying note 107. "Even when legal regulation in a certain area is forbidden to the [Federal] Rules, the policies underlying valid Rules may help to shape valid federal common law." Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 774 (footnote omitted).

> To hold the contrary . . . would be but to declare that although the power conferred by Congress upon this Court to adopt equity rules is controlling, nevertheless the interpretations of the rules and the limitations which arise from a proper

If the application of the Entire Controversy doctrine by New Jersey as F2 would frustrate F1's policy on party autonomy as reflected in Rule 19, thereby depriving the federal court of the power to control its own procedures,[145] that effect would occur long before there was a judgment in federal court. Moreover, the impact of the holding in *MortgageLinq* that a dismissal in New Jersey is "without prejudice" would be no different in this situation than it would be if there were a judgment in F1. Here too one can imagine contingencies that would require the federal courts to sacrifice their own, and to bear the costs of New Jersey's procedural policies.[146]

One response to this line of reasoning might be that, if federal law indeed governs the preclusive effects of a federal judgment on the question involved in *MortgageLinq*, the plaintiff can avoid any difficulty simply by waiting to file suit in New Jersey. But, as a result of a looming limitations bar or other reasons, that may be a matter beyond the plaintiff's control.

Remembering the law that governs once there *is* a judgment is useful, however, since we can now see that permitting New Jersey to apply the Entire Controversy doctrine before judgment would undermine not only Rule 19 but federal judge-made preclusion law as well.

The displacement or preemption of state law in order to protect federal interests usually occurs in the proceeding, federal or state, in which that interest is directly involved. But there is no requirement to that effect, as the process of determining the law that governs the preclusive effects of federal judgments itself demonstrates.[147] The real question here, as when assumptions were made in order to ease the way for full faith and credit analysis, is whether the federal interests are sufficiently important, and the threat to those interests sufficiently plausible, to justify the displacement of state law.

IV. NEW JERSEY AS THE FIRST FORUM (F1)

A consideration of the questions asked and answered by the court in *MortgageLinq* has already entailed some attention to the status of New Jersey as F1.[148] It may be useful to bring together prior analysis that bears

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construction of them, as expounded by this court and enunciated in its decisions, are without avail.

Tullock v. Mulvane, 184 U.S. 497, 513 (1902).

145. *See supra* text accompanying notes 96-115.

146. *See supra* text accompanying notes 76-95.

147. *See supra* note 107 and accompanying text.

148. *See, e.g., supra* text accompanying note 82.

on this situation and to complete the picture by sketching in a few missing details.

A. New Jersey State Court

New Jersey enforces its views concerning the mandatory joinder of parties through something called "the Entire Controversy doctrine," not "*res judicata*" or "preclusion," and the effect of its application is far beyond anything known to preclusion law in 1790. Neither the label used nor the fact that in this application the doctrine is a modern development suffices to negate the obligations otherwise imposed by the full faith and credit clause and its implementing statute. In that regard, it bears emphasis that the New Jersey courts have treated this aspect of the doctrine as functionally related to, and a logical outgrowth of, the doctrine as applied to claims and have justified both according to the conventional goals of preclusion law. Moreover, the effect of precluding suit against persons not joined as required by the doctrine is to preclude a plaintiff's claims against those persons.[149]

Similarly, there is no basis in the statute, the cases interpreting it, or contemporary attitudes towards preclusion, to except from the federal obligation rules of F1 that are deemed to be outside the "central core" because not sufficiently related to the supposed central values of preclusion. In any event, such analysis could not stand alone because it fails to reflect the central policy of full faith and credit—the unification of the country through respect for the judicial proceedings of F1.[150]

Thus, even if New Jersey's (F1's) Entire Controversy doctrine as applied to parties were thought to fall outside the "central core," F2 should not be permitted to disregard the doctrine in subsequent litigation there, because to do so would deprive New Jersey of the power to control its own procedures. New Jersey's different view of party autonomy and of the putatively most efficient litigation package is entitled to protection.

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149. *See supra* text accompanying notes 28-35. Professor Dane's characterization of the Entire Controversy doctrine as penalizing party behavior may not be a "subterfuge," Dane, *supra* note 90, at 186, but neither does it suffice to disengage the doctrine from its oft-proclaimed domestic law roots in preclusion law or from the interjurisdictional consequences that those roots entail. Claim preclusion, which after all is a subset of the same doctrine, can be explained in similar terms. Moreover, it is precisely because the *MortgageLinq* court's "without prejudice" solution is so obviously self-defeating from the perspective of fairness to parties, *see supra* note 92 and *infra* note 152, that the perspective itself seems, if not a "subterfuge," then an after-thought.

150. *See supra* text accompanying notes 36-55.

The rule announced in *MortgageLinq* that entire controversy dismissals are "without prejudice" interjurisdictionally was apparently intended to apply when New Jersey is F1 as well as when it is F2.[151] It is not, I have argued, a rule that New Jersey is empowered to make.[152] If so, it is also not a rule that courts of other states or federal courts (F2) are empowered to follow. Precisely because the rule would have most of its bite in cases in which New Jersey was F1, as announced in *MortgageLinq* it would appear to be a violation not just of the state's obligations as F2, but also of its obligations as F1.

Perhaps, however, this situation should be distinguished by analogy to the traditional full faith and credit treatment of statute of limitations dismissals. A plaintiff whose suit in F1 is dismissed on limitations grounds and who is barred from suing again on the same claim in F1 is nevertheless usually free to sue in any other jurisdiction whose limitations law will permit it.[153] Are there reasons why the Entire Controversy doctrine should be treated differently (when New Jersey is F1)?[154]

The special treatment of limitations dismissals is the product of the traditional, largely discredited choice of law approach to limitations.[155] For that reason alone, it is not a good candidate for extension into other areas.[156]

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151. *See supra* text accompanying note 82.

152. *See supra* text accompanying notes 87-95. From the perspective of fairness to parties, it is also a self-inflicted wound, leaving the objects of the state's concern subject to suit in other jurisdictions. *See supra* note 92, 149.

153. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 cmts. a & b (1988 rev.); RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. f, reporter's note (1982).

154. Any attempt to use the analogy to salvage such treatment of a dismissal by New Jersey as F2, which I have analyzed separately, *see supra* text accompanying notes 76-95, encounters additional objections. The limitations rule does not pose for litigants the problems of predictability that the New Jersey scheme entails, even if dismissal is "without prejudice," and does not deprive F1 of the power to control its own procedures.

155. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1988 rev.). "We think that the statute of limitations should be dealt with in much the same way as any other choice of law problem, and that we should no longer be bound by the notion that it is procedural." 65 A.L.I. PROC. 322 (1988).

Professor Dane regards the modern choice of law approach to statutes of limitations, which is favored by the American Law Institute, as "reductive and doctrinaire and unnecessary." Dane, *supra* note 90, at 188. I am honored. *Cf.* American Nat'l Red Cross v. S.G., 505 U.S. 247, 256 n.7 (1992).

156. It "represents but a reflex of the traditional, monolithic approach to statutes of limitations and is hardly good authority." Burbank, *Interjurisdictional Preclusion*, *supra* note 1, at 797 n.317. *See infra* note 160. Note, however, that the American Law Institute made changes in section 110 of the Restatement only to the extent necessary to reflect

Also, any attempt categorically or functionally to exempt from the obligation of full faith and credit adjudications based on F1's "procedural" rules would quickly run up against the reality that preclusion law is to a great extent a reflection of procedure,[157] as well as the important role that the federal obligation plays in enabling F1 to control its own procedures.[158]

If the supposed analogy preserved the New Jersey scheme from a full faith and credit violation, there would be no apparent basis on which to distinguish dismissals for failure to join claims, to which that scheme seems also intended to apply.[159] For that matter, what basis would there be to distinguish the decision by any state to make dismissals under any aspect of its domestic preclusion law "with prejudice" internally but "without prejudice" externally?[160] What then would remain of the underlying federal

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changes made to section 142. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 reporter's note (1988 rev.). *See also infra* note 160.

157. *See, e.g.*, Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 469-70 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951).

In holding that full faith and credit did not require a federal court to give effect to the rendering state's compulsory counterclaim rule, a panel of the Fifth Circuit distinguished between the purposes of "essentially procedural res judicata rules" animated by an "interest in judicial economy" that is "local in scope," and "the national interest in avoiding *re*litigation of adjudicated issues." Chapman v. Aetna Finance Co., 615 F.2d 361, 363 (5th Cir. 1980). The distinction would exempt from the federal obligation a good deal of modern claim preclusion law, which is reason enough to reject it. *See also* Virginia-Carolina Chem. Co. v. Kirven, 215 U.S. 252, 260 (1909) (conclusion that federal judgment not res judicata impossible if state code of procedure, applicable in the federal action, in fact required defendant "to set up his demand for damages [counterclaim] in the answer").

I have previously argued that "[i]n recognizing the interdependence of procedure and substance . . . it is not necessary, although it may be convenient, to reject the utility of any attempt to develop rules or standards for court rulemaking purposes." Burbank, *supra* note 142, at 1188. I am, therefore, sympathetic to Professor Dane's attempt to draw lines between procedure and substance. *See* Dane, *supra* note 90, at text accompanying notes 22-23, 44-46. To avoid the costs of essentialism, however, one must keep in mind the purpose of the line-drawing exercise.

> Law reformers have long assured us that procedure is technical, details—in short, adjective law. Whatever the accuracy of those labels as to other matters, only in Wonderland do they describe rules of preclusion.

Stephen B. Burbank, *Afterwords: A Response to Professor Hazard and a Comment on* Marrese, 70 CORNELL L. REV. 659, 662 (1985) (footnote omitted).

158. *See supra* text accompanying notes 72-73.

159. *See supra* text accompanying note 82 and note 149.

160. It is not clear how far the principle underlying the effect of dismissals based on the statute of limitations does or should extend. Should it extend, for example, to a dismissal based on the statute of frauds if the second jurisdiction has a different statute that would lead to a different result? Neither authority nor policy lends firm

policy? "The force of [full faith and credit] is not so weak that it can be evaded by mere mention of the word[s] [without prejudice]."[161] Otherwise, "States would . . . be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People."[162]

Accordingly, when defendants are omitted from litigation in New Jersey state court in violation of the Entire Controversy doctrine, once that litigation comes to judgment, the courts of every other state and the federal courts are obligated to preclude another lawsuit to the same extent that it would be precluded in New Jersey. With one exception, however, the obligation does not arise prior to judgment in F1, even though a subsequent suit in New Jersey would then be precluded.[163] The courts of F2 are free to preclude if authorized by domestic law, but federal law does not require them to do so.[164]

The exception arises in state law diversity actions in federal court in New Jersey commenced after a state court action to which New Jersey's party joinder rule applies. It would materially affect the character or result of such actions if the federal court were free to entertain a case that would be barred in New Jersey state court and the difference would also affect the choice of forum. The policies animating Rule 19 of the Federal Rules of Civil Procedure do not require protection in this situation, as they arguably do when the first action is filed in federal court, and there is no other plausible basis for the federal court to refuse to apply state law.[165]

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support to nonpreclusion in such a case. Indeed, nonpreclusion seems questionable even with respect to the statute of limitations.

RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. f, reporter's note (1982).

Professor Dane assures us that his argument relying on the issue preclusive, but not claim preclusive, nature of "non-merits dismissals," Dane, *supra* note 90, at 190, "is not just an academic gloss" nor "mere trickery or sleight of hand." *Id.* Perhaps not, but the argument does not address the evident incompatibility with the purposes of full faith and credit of permitting New Jersey to distinguish between merits and non-merits dismissals according to its view of interjurisdictional, as opposed to domestic, needs. *See supra* text accompanying note 92.

161. Howlett v. Rose, 496 U.S. 356, 382-83 (1990) (supremacy clause).

162. *Id.* at 383.

163. *See supra* text accompanying notes 133-35.

164. "A state court, in conformity to state policy, may, by comity, give a remedy which the full faith and credit clause does not compel." Milwaukee County v. M. E. White Co., 296 U.S. 268, 272 (1935).

165. *See supra* text accompanying notes 104-115. *Cf.* Seaboard Finance Co. v. Davis, 276 F. Supp. 507 (N.D. Ill. 1967) (federal diversity court as F2 must apply Illinois prior pending action statute when Illinois state courts would do so, here because of case pending in California as F1). *Compare supra* note 82 (judgment).

B. *New Jersey Federal Court*

Consideration of New Jersey's obligations as F2 required attention to situations in which F1 was a federal court. That analysis supports the conclusion that federal law governs the preclusive effects of the federal question judgment of a federal court, and it makes no difference where that federal court sits.[166] The same conclusion was suggested for a state law diversity judgment, where the situation chosen for the analysis envisioned F1 as a federal court sitting in New Jersey applying New Jersey substantive law. The conclusion is, however, not as firm and requires a sensitive appreciation of the interplay between the Federal Rules of Civil Procedure and federal common law.[167]

Finally, if the initial federal action in *MortgageLinq* had been brought in New Jersey, the question presented would have been whether New Jersey could preclude a subsequent state court action prior to judgment in F1. Consideration of the federal court's procedural interests, reflected in Rule 19, suggests that, even before judgment, federal common law would preempt the application of the Entire Controversy doctrine. If so, it would make no difference whether the federal court action had been brought to adjudicate a federal question or in diversity to adjudicate state law claims.[168]

V. CONCLUSION

The Entire Controversy doctrine may be unique to New Jersey, but it furnishes a fertile field in which to cultivate questions, the answers to which are of significance far beyond its borders.

Perhaps the most interesting of those questions relates to the supposed equivalence of "judicial proceedings" and judgments for purposes of the full faith and credit statute. I have suggested that the equivalence is not complete, that in some circumstances where there has not yet been a judgment in F1, the statute obligates F2 to act as F1 would. In other words, I have suggested that the court in *MortgageLinq* was wrong on the facts of the case, as well as on assumptions relating to distinctions it deemed irrelevant.

Note that a federal diversity court in New Jersey, sitting as F2, would also be required to apply the Entire Controversy doctrine after judgment in F1 if full faith and credit permitted New Jersey to, and it would, do so (*i.e.*, give greater preclusive effect).

166. *See supra* text accompanying notes 96-103.

167. *See supra* text accompanying notes 104-15.

168. *See supra* text accompanying notes 138-47.

But the matter deserves, and I hope to give it, more intensive historical and analytical attention.