

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1986

Preclusion and Federal Choice of Law

Gene R. Shreve

Indiana University Maurer School of Law, shreve@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Civil Procedure Commons](#), [Conflict of Laws Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Shreve, Gene R., "Preclusion and Federal Choice of Law" (1986). *Articles by Maurer Faculty*. Paper 960.
<http://www.repository.law.indiana.edu/facpub/960>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

Texas Law Review

Volume 64, Number 7, April 1986

Preclusion and Federal Choice of Law

Gene R. Shreve*

I. Introduction

Doctrine that sets the preclusive effects of federal judgments reflects both concern over the appropriate use and conservation of federal judicial resources and the influence of other developments in federal procedure. These factors also are implicated when federal courts are asked to give preclusive effect to state court judgments. But federal courts have considerably less capacity to apply federal doctrines to determine the preclusive effect of state judgments than they do to determine the preclusive results of federal actions because the full faith and credit statute,¹ section 1738, requires that state judgments be given as much preclusive effect in federal court as they would be given by the courts that rendered them. In many state-judgment cases, section 1738 has long confined federal courts to applying the preclusion law of the rendering state. In other state-judgment cases, the role of section 1738 has been shrouded in un-

* Professor of Law, New York Law School. Work leading to the publication of this Article was funded by a New York Law School faculty research grant. I wish to acknowledge the research suggestions of Michael Botein and Gil Kujovich and the assistance of Maurice Holland, Michel Rosenfeld, David Shapiro, Marjorie Silver, and Donald Zeigler, who read and made helpful comments on the manuscript. I take sole credit, of course, for any aspect of the Article that might trouble the reader. I also wish to acknowledge the research assistance of New York Law School students Thalia Stavirdes and John Brummet. Finally, I wish to thank Marguerite Shreve for her invaluable editorial help.

1. The statute reads as follows:

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 (1982).

certainty and controversy. My purpose in this Article is to suggest how the full faith and credit statute should be used to structure choice-of-law decisions when state judgments are presented in federal court. This Article will address three problems left unresolved in the Supreme Court's recent decision, *Marrese v. American Academy of Orthopaedic Surgeons*.²

First, it is not always easy or, perhaps, even possible for federal courts to determine the content of state preclusion law. What if state law is undeveloped or unclear? What if the nature of the particular preclusion issue is such that no state court will ever rule on it? To what extent are the obligations of section 1738 relaxed when such difficulties appear? This Article suggests that section 1738 should be read to require that federal courts give preclusive effect to state judgments, whether the conclusion of preclusion is supported by apposite state precedents or merely suggested from a reading of state preclusion law. When state law provides no direction, however, federal courts should be permitted to revert to federal preclusion law and policy.

Next, when should another congressional act be read to imply an exception to section 1738? This Article argues that a presumption against implying an exception to section 1738 should exist in order to guard against judicial overreaching, reinforce the finality of state judgments, and promote harmony among state and federal courts. This presumption seems capable of withstanding arguments implying an exception to section 1738 from the creation of *concurrent* federal jurisdiction. And, in *Marrese* and many other cases, the fact that preclusion will defeat exercise of the federal court's *exclusive* jurisdiction is also insufficient to overcome this presumption.

Finally, when, if ever, should section 1738 leave federal courts free to give greater preclusive effect to a state judgment than would the rendering state? This Article contends that although the statute should place limits on such authority, use of section 1738 categorically to prohibit greater preclusion is neither inevitable nor desirable. Section 1738 should be read to leave federal courts free to apply federal law to augment the preclusive effects of a state judgment whenever doing so would not frustrate the purpose behind the state's rule of lesser preclusion and would advance the purpose behind the federal rule of greater preclusion.

2. 470 U.S. 373 (1985).

Preclusion and Choice of Law

II. Preclusion in the Federal Courts

A. Federal Courts as an Intramural System

Federal courts generally regard the preclusive effects of federal judgments to be a question of federal law.³ Because Congress has provided very little guidance,⁴ federal courts have traditionally elaborated preclusion standards for federal judgments as a matter of common law.⁵ The federal courts' role in this context is equivalent to that played by state courts in determining the force and effect of their judgments. In either case, the court is administering an *intramural*⁶ law of preclusion for its own court system. Under the direction of the United States Supreme Court, the federal courts have extended the reach of their intramural preclusion law in both claim preclusion and issue preclusion.⁷

3. It is clear that federal preclusion law governs federal question judgments. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 324 n.12 (1971); *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). There is more question whether the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires reference to state preclusion law to determine the preclusive effect of federal diversity judgments, but the greater weight of case and critical authority suggests that *Erie* has little or no role to play in this context and that federal law should determine the preclusive effect of all federal judgments. See *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1496-97 (D.C. Cir. 1983); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1166 (5th Cir. 1981); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 715-16 (5th Cir. 1975); *Williams v. Ocean Transp. Lines, Inc.*, 425 F.2d 1183, 1189 (3d Cir. 1970); *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962); RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 696 (1985); Degan, *Federalized Res Judicata*, 85 YALE L.J. 741, 769-70 (1976). But see *Gasbarra v. Park-Ohio Indus.*, 655 F.2d 119, 122 (7th Cir. 1981) (referring to state law to determine the preclusive effect of a federal diversity judgment); Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 631, 637-38 (1985) (questioning the invariable application of federal law to determine the effect of federal diversity judgments); Note, *Res Judicata in the Federal Courts: Federal or State Law?*, 17 IND. L. REV. 523 (1984) (arguing that the *Erie* doctrine should be understood to require measurement of the preclusive effect of diversity judgments according to state law).

The majority view has been developed most fully in Professor Degan's article and seems to be the preferable approach. The subject, however, lies beyond the scope of this Article, which discusses state judgments. The preclusive effect of federal judgments in state court also lies beyond the scope of this Article. For a valuable discussion of that subject, see Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759 (1979).

4. 28 U.S.C. § 1963 (1982), which provides for the registration of federal judgments in other federal districts, states that "[a] judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner." Section 1963 fails, however, to provide any standards for determining the scope of federal preclusion. Furthermore, Professor Hazard identifies "only one federal statute that expressly deals with *res judicata*, the well-known provision concerning issue preclusion of the Clayton Act." Hazard, *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 643 (1985).

5. See 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403, at 11 (1981).

6. See Casad, *Introduction to RESTATEMENT (SECOND) OF JUDGMENTS* at 2 (1982); Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510, 511 (1981) [hereinafter cited as Casad, *Intersystem Issue Preclusion*].

7. The United States Supreme Court has employed this terminology in several of its recent cases. *E.g.*, *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). The term "claim preclusion" has become the modern synonym for the combined terms "merger" and "bar." "Issue preclusion" has similarly succeeded "collateral estoppel" and "estoppel by judgment." The

The doctrine of claim preclusion prevents parties to final judgments from relitigating claims and may also foreclose the litigation of new claims. A new claim is precluded when it is so closely related to a previously raised claim that together they constitute a "claim"⁸ in a larger sense. This expanded concept of a claim is intended to signify all of the alternative legal theories and the full scope of remedies generated by the facts of the original controversy.⁹ Whether the entire claim, in this broad sense, was actually put forward in the prior case is immaterial; what matters is whether it could have been put forward.¹⁰

Like their state counterparts, federal courts have faced problems in determining the limits of the doctrine of claim preclusion. Disappointed parties clearly need to be prevented from relitigating the same claims, but it is more difficult to decide when matters not actually raised in the prior proceeding should also be precluded. The Supreme Court once adhered to a formalistic and relatively narrow conception of a claim for preclusion purposes.¹¹ In more recent times, however, many lower federal courts have adopted the expansive definition of a claim contained in the *Restatement (Second) of Judgments*,¹² and the Supreme Court has indi-

scholarship of the late Professor Alan Vestal is primarily responsible for causing this change. *E.g.*, A. VESTAL, *RES JUDICATA/PRECLUSION* (1969); Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 30 (1964); *see also* Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 27 n.2 (1984) (discussing the adoption of Vestal's preclusion terminology by the *Restatement (Second) of Judgments*). Some of my sources employ the earlier terminology. *E.g.*, *infra* note 9. Ordinarily, I will not note the difference in terminology. To simplify matters, I will use the terms claim and issue preclusion throughout the Article.

8. The phrase, "cause of action," is also used. *E.g.*, *Nevada v. United States*, 463 U.S. 110, 130 (1983).

9. *See* Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U.L. REV. 357, 359-61 (1967). For a lucid description of this phenomenon before it was called claim preclusion, *see* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 343-44 (1948).

10. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *see also* *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (holding that parties are also bound as to matters that could have been raised); *Cronwell v. County of Sac*, 94 U.S. 351, 352-53 (1877) (same); *cf.* *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) ("Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.").

11. *See, e.g.*, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927) (describing a cause of action as "the violation of but one right by a single legal wrong"); 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4407, at 59 (describing *Baltimore* as limiting the idea of a claim "to violation of a single right by a single wrong").

12. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). Section 24 employs a transactional approach. Subsection (1) states that the former judgment precludes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose." Subsection (2) provides that the scope of "transaction" and "series" of transactions "are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *See generally* 18 C. WRIGHT, A. MILLER

Preclusion and Choice of Law

cated that it may do the same.¹³

The doctrine of issue preclusion supplements claim preclusion by giving a final adjudication preclusive effect in a subsequent case that cannot be said, even in the broadest sense, to share the same claim. The doctrine precludes relitigation of issues of fact or law so long as the issue was actually raised, litigated, and necessary to the judgment in the prior proceeding.¹⁴

One question has dominated modern-day developments in issue preclusion in both the federal and state intramural systems: When, if ever, can nonparties to the prior adjudication employ the doctrine? At one time the federal rule was never. Under the Supreme Court's mutuality doctrine, it was impossible for those who could not have been bound by a prior adjudication to use it to their advantage.¹⁵ Later, the Supreme Court attached importance to the difference between binding total strangers¹⁶ to the prior litigation and binding those who had previously obtained an adjudication of the issue, albeit against a different party.¹⁷ The

& E. COOPER, *supra* note 5, § 4407, at 62 n.35 (surveying federal cases adopting § 24 and noting other federal decisions that have employed alternatives to the transactional approach of § 24 to broaden the scope of claim preclusion).

13. The Supreme Court briefly discussed § 24 in *Nevada v. United States*, 463 U.S. 110 (1983), observing that "[d]efinitions of what constitutes the same cause of action have not remained static over time." *Id.* at 130. The Court followed this observation by comparing the claim definitions in the first and second *Restatement of Judgments*. *Id.* The Court praised § 24 as "a more pragmatic approach." *Id.* at 131 n.12. The Court declined to go further and "parse any minute differences which these differing tests might produce" because it concluded that the plaintiffs were, under either test, subject to claim preclusion. *Id.* at 131.

14. See *F. JAMES & G. HAZARD, CIVIL PROCEDURE* 618-19 (3d ed. 1985); cf. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) ("Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided."); *A. VESTAL, supra* note 7, at 196-206.

These prerequisites have no counterpart in claim preclusion. The latter may be based on any judgment on the merits, including (subject to limited possibilities of collateral attack—see *infra* note 63) default judgments. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 18 comment a (1982); *J. FRIEDENTHAL, M. KANE & A. MILLER, supra* note 3, at 655.

15. *Buckeye Powder Co. v. E.I. DuPont de Nemours Powder Co.*, 248 U.S. 55, 63 (1918); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912).

16. It remains true that genuine strangers to the prior proceeding cannot be bound by it. "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). In a few federal cases, strangers to a prior adjudication in the technical sense that they were not parties have been subjected to issue preclusion because of the extent of their actual involvement. See, e.g., *Montana v. United States*, 440 U.S. 147, 155 (1979) (holding that even though it was not a named party, the United States "plainly had a sufficient 'laboring-oar' in the conduct of the state-court litigation to actuate principles of [collateral] estoppel"). For arguments that issue preclusion should be used more extensively against nonparties, see *Berch, A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 ARIZ. ST. L.J. 511. But see *Pielemeier, Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383 (1983) (discussing possible violations of due process when the doctrine of collateral estoppel is used against a nonparty in the prior litigation).

17. The Court criticized the mutuality doctrine for "failing to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost."

Court has now dispensed with the doctrine of mutuality¹⁸ and permits strangers to the prior litigation to employ issue preclusion against those who were parties,¹⁹ whenever it appears from the circumstances that it is fair to do so.²⁰

Maximum use of claim and issue preclusion makes particular sense in the federal intramural system for two reasons. First, preclusion doctrines promote conservation of severely-taxed federal judicial resources.²¹

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979); see also *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 322-27 (1971) (discussing the decline of the mutuality requirement).

For an excellent discussion of *Parklane*, see Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615 (1980).

18. Although the Supreme Court refused to invoke the mutuality requirement in *Blonder-Tongue*, the implications of the decision beyond its patent-law context were unclear. But, in *Parklane*, "the Court conclusively ended the mutuality of estoppel requirement in the federal courts and authorized the use of nonmutual estoppel." Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 968 (1984). For a survey of lower federal court decisions following *Parklane*, see Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35, 55-65 (1985).

19. Strangers to the prior adjudication may employ issue preclusion (also called collateral estoppel) defensively or offensively. The Court recently used the terms to connote whether the party seeking the benefit of preclusion does so from the posture of a plaintiff (offensive use) or defendant (defensive use). *United States v. Mendoza*, 464 U.S. 154, 159 n.4 (1984); see also 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4464, at 576 n.13 (surveying numerous federal decisions permitting defensive nonmutual issue preclusion); *id.* at 577-78 n.14 (surveying numerous federal decisions permitting offensive nonmutual issue preclusion). It now appears that issue preclusion may be invoked defensively against the United States as a party, *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 174 (1984), but not offensively, *Mendoza*, 464 U.S. at 162. *Stauffer* and *Mendoza* are discussed in Levin & Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113 (1984). For further discussion of *Mendoza*, see Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equity*, 99 HARV. L. REV. 847 (1986).

20. *Parklane* can best be understood as completing the process, begun in *Blonder-Tongue*, of replacing one fairness test with another. The mutuality doctrine was bottomed on the idea that it was unfair to create risk-free opportunities for preclusion and that benefits of the preclusion were spoils of victory earned through the risk of equally adverse consequences. Rejeeting this idea, *Parklane* declared that henceforth it would be necessary to come up with some good reason why non-mutual offensive preclusion should not be permitted. The Court granted federal courts "broad discretion to determine when it should be applied." *Parklane*, 439 U.S. at 331. Federal courts may use their discretion to refuse offensive preclusion when it is sought by one who deliberately bypassed an opportunity to participate in the original proceeding, when the defendant's stake in the original proceeding was so small that he had no incentive to defend vigorously, when the previous judgment relied on for preclusion was inconsistent with other judgments, or when the subsequent proceeding afforded significantly more advantageous procedural opportunities for the defendant. *Id.* at 330-31. These considerations, among others, provide a pragmatic and loose-textured fairness test. This new test shifts the focus of attention from the party wishing to use the doctrine to the party against whom it is invoked.

21. Docket overcrowding has been a serious problem for some time, particularly in the federal circuit courts. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 55-56, 1572-74 (2d ed. 1973); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 31-33 (1973). See generally Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969) (discussing the heavy caseloads in the federal appellate courts); Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255 (1975) (same); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 959 (1964) (same).

Preclusion and Choice of Law

Although some commentators have questioned the relationship between preclusion and judicial economy,²² it seems clear that growing aversion to relitigation is a leading reason for the expansion of preclusion doctrines in general²³ and in the federal intramural system in particular.²⁴ Second, the liberal claim²⁵ and party²⁶ joinder available in federal court is intended to dispose of as many controversies as possible in the first instance. By penalizing piecemeal litigation and delay, broadened preclusion pressures litigants to avail themselves of the many opportunities that the initial lawsuit provides.²⁷

B. Intersystem Preclusion

When federal courts consider the effect of state judgments, the courts are part of an *intersystem*²⁸ judicial process. So long as state and federal preclusion law is identical, intersystem cases pose no special difficulties. This is frequently true, because the expansion of the preclusive effects of federal judgments has its counterpart in the law of most states.²⁹ The question whether to rely on state or federal law in such

22. See 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4403, at 14 ("It is difficult to find much independent support for res judicata rules simply as a means to protect overworked courts."); Cleary, *supra* note 9, at 348-49 (rejecting "the saving in court time" as a "particularly unconvincing" justification for what would now be called claim preclusion).

23. Vestal, *supra* note 7, at 35; cf. Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 611 (1985) ("Resource conservation is a familiar and persistent motif in the literature of courts. Of late, as courts appear overused and underproductive, interest in economy has increased.").

24. The Supreme Court said in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), that it found one of its fifty-year-old res judicata precedents "even more compelling in view of today's crowded dockets." *Id.* at 401.

25. For example, Rule 18 of the Federal Rules of Civil Procedure "now makes it clear that any party who has asserted a claim for relief against an opposing party or parties may join with it whatever other claims he may have, regardless of their nature, against any opposing party." C. WRIGHT, *THE LAW OF FEDERAL COURTS* 526 (4th ed. 1983).

26. For example, the limits of Rule 20 of the Federal Rules are sufficiently broad that all those injured by a single tort may join as plaintiffs The rule does not require that *all* questions presented by each plaintiff be common; it is enough if there is any . . . question common to all the claims. Similarly, all distinctions between joint and several rights or obligations on a contract have been abolished.

F. JAMES & G. HAZARD, *supra* note 14, at 476 (emphasis in original).

27. Federal litigants also enjoy liberal discovery and relatively broad opportunities for pleading amendment. It has been noted that, along with liberal claim pleading, "[t]hese opportunities thus enlarge the scope of what 'might have been' litigated by the plaintiff in the first action and should correspondingly enlarge the scope of claim preclusion." F. JAMES & G. HAZARD, *supra* note 14, at 617.

28. The term is from Casad, *Intersystem Issue Preclusion*, *supra* note 6, at 511.

29. Propreclusion developments in federal court are part of a larger movement. "[T]he trend in the United States is toward increased finality." R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: COMMENTS—CASES—QUESTIONS* 657 (3d ed. 1981). The approaches taken by the *Restatement (Second) of Judgments* in its broad, transactional definition of a claim (§ 24) and in its rejection of the mutuality doctrine (§ 29) generally reflect the positions of most state intramural systems. The nearness of the emerging federal test to the *Restatement's* claim definition has already been noted. See *supra* notes 12-13 and accompanying text. The Supreme Court's nonmutual preclusion test in

cases is largely a matter of protocol.³⁰

But different court systems have not set the same boundaries for their preclusion doctrines; the federal and various state systems have adopted different approaches.³¹ This is not because of disagreement over what preclusion policies courts should recognize. The same general policies³² are accepted everywhere.³³ Furthermore, concern for correctness of judicial decision, the prudential counterforce to preclusion,³⁴ is also a constant in all systems. Differences result because of other policies in each system that the preclusion law must support (for example, the federal policies of liberal claim and party joinder, pleading amendments, and discovery)³⁵ and because of varying local assessments of the scarcity

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-28 (1979), is quite similar to the criteria appearing in § 29 of the *Restatement*. See J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 3, at 692 n.36 (suggesting that the American Law Institute adopted the *Parklane* criteria in § 29).

30. For example, in *Brown v. St. Louis Police Dep't*, 691 F.2d 393 (8th Cir. 1982), although the Eighth Circuit looked to Missouri law to determine the claim preclusive effect of a Missouri state judgment, the court noted that it would have come to the same conclusion had it instead relied on federal preclusion doctrine. *Id.* at 396 n.2.

31. The clash of viewpoints may be largely a twentieth-century phenomenon. "Courts and judges of the 19th century shared a common understanding of *res judicata* in terms of *what* a judgment decided. . . . [T]his common agreement no longer exists . . ." Degnan, *supra* note 3, at 742 (emphasis in original).

32. Briefly stated, the policies are "to save judicial energy, to prevent harassment of the defendant, to further societal interests in the orderly and expeditious resolution of controversies, and to give repose . . ." A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICTS OF LAWS* 1459 (1965). For further discussion, see A. VESTAL, *supra* note 7, at 7-12; Vestal, *supra* note 7, at 31-43. On the particular significance of giving repose to judicial decisions, see *infra* note 104.

33. See F. JAMES & G. HAZARD, *supra* note 14, at 590 (stating that the "social objectives of the rules [of *res judicata*] have remained much the same").

34. Strangers to the prior proceeding are usually able to resist its preclusive effects on due process grounds. See *supra* note 16. This is less because the judgment might be incorrect than because due process, in this context, guarantees a "day in court." Because those who participated in the prior proceeding have had a day in court, they usually will be unable to use due process as a shield against preclusion. See *infra* notes 266-70 and accompanying text. When participants' resistance to preclusion succeeds, it is because of concern over the correctness of the prior adjudication.

It is often said that the incorrectness of a judgment does not diminish its preclusive effect. See, e.g., *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 (1981) (stating that the "res judicata consequences of a final, unappealed judgment [are not] altered by the fact that the judgment may have been wrong"). This is certainly true when the second suit is a replication of the first, but the more dissimilar the suits become, the more the point loses force. Every system seems to recognize some point at which preclusion (although constitutional) is inappropriate because the judgment does not carry a sufficient assurance of correctness to properly govern the different case. As Learned Hand observed, *res judicata* "must be treated as a compromise between two conflicting interests: the convenience of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs." *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir. 1955); see also Vestal, *supra* note 7, at 29 (discussing *Lyons*).

The functions that concerns about correctness play in checking constitutional applications of preclusion may explain why preclusion law—unlike the law of personal jurisdiction—has, for the most part, not become a subcategory of the constitutional law of due process.

35. See *supra* notes 25-27 and accompanying text.

Preclusion and Choice of Law

of judicial resources.³⁶ Within constitutional limits, each intramural approach determines how many opportunities to litigate should be sacrificed for the good of its system.

Two important issues illustrate conflicting approaches: claim definition and recognition of nonmutual issue preclusion. Most state systems give "claim" a broad definition, similar to that found in the *Restatement (Second) of Judgments* and the federal intramural system.³⁷ A minority of states, however, adhere to a narrower definition. They permit accident plaintiffs to split what appears to be a single claim into separate suits for property damage and personal injury.³⁸ Similarly, although most state systems have joined the *Restatement (Second)* and the federal courts in permitting some degree of nonmutual issue preclusion,³⁹ a minority still adhere to the mutuality doctrine.⁴⁰

There are other, not yet as significant, points of existing or potential conflict in preclusion law. For example, when should judgment in the original proceeding be considered final,⁴¹ and what effect, if any, should be given punitive dismissals?⁴² Claim preclusion is subject to real and potential differences over the scope of privity⁴³ and over the effect of rule

36. Cf. *supra* notes 21, 24 and accompanying text (discussing the view that federal judicial resources are overtaxed).

37. See *supra* notes 12-13, 30 and accompanying text.

38. Discussions of claim splitting in accident cases may be found in J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 3, at 695; F. JAMES, CIVIL PROCEDURE 557-58 (1965); Annot., 62 A.L.R.2d 977 (1958). The most recent case survey lists California, Connecticut, Illinois, Indiana, Montana, New Jersey, New York, Oregon, and Virginia as jurisdictions that permit separate accident suits for personal injury and property damage. Annot., 24 A.L.R.4TH 646, 685-86 (1983). At least two states in this group appear to be wavering. See *Reardon v. Allen*, 88 N.J. Super. 560, 564, 213 A.2d 26, 28 (N.J. Super. Ct. App. Div. 1965) (stating that absent exceptional circumstances there is only one cause of action); *McNichols v. Weiss*, 12 A.D.2d 646, 646, 208 N.Y.S.2d 721, 722 (1960) (refusing to allow plaintiff to split personal injury, property damage, and loss of services claims resulting from a single accident).

39. See *supra* notes 18-20, 30.

40. See cases cited at RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note (1982); *Casad, Intersystem Issue Preclusion, supra* note 6, at 510 n.1, 518 n.35; Annot., 31 A.L.R.3d 1044, 1062-64 (1970). Professor Casad writes that "in recent years, nine states have reaffirmed their adherence to the mutuality doctrine." *Casad, Intersystem Issue Preclusion, supra* note 6, at 510 n.1 (citing cases from Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, New Mexico, North Carolina, and North Dakota).

41. "[I]t has become clear in the federal courts that *res judicata* ordinarily attaches to a final lower court judgment even though an appeal has been taken and remains undecided." 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4427, at 270. In contrast, some state systems do not give finality to their judgments if there is a possibility that the outcome will be changed through appeal. See, e.g., *Chavez v. Morris*, 566 F. Supp. 359, 360 (D. Utah 1983) ("A Utah state court judgment is not final while an appeal is pending or until the time to appeal has expired.").

42. "Penalty dismissals seem exquisitely difficult." 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4467, at 643.

43. "Res judicata principles differ from state to state" concerning "the definition of persons in privity with a party . . ." R. CRAMTON, D. CURRIE & H. KAY, *supra* note 29, at 746.

12(b)(6)-type dismissals.⁴⁴ Differences in issue preclusion law include the scope of the “necessarily decided” prerequisite,⁴⁵ extension of the doctrine to ultimate as well as to evidentiary facts,⁴⁶ and the effects, if any, of default judgments.⁴⁷

Choice-of-law issues arise when a state judgment presented for enforcement in federal court comes from a system with a conflicting intramural preclusion rule. To the extent that federal policies are at stake when federal courts are called upon to enforce state judgments, it might be reasonable to expect federal courts to apply their own preclusion doctrine in intersystem cases. The Supreme Court, however, has read the full faith and credit statute⁴⁸ to greatly restrict the authority of a federal court to vary from the preclusion law of the rendering state.

Section 1738's requirement, that federal courts give “such faith and credit” to state “records and judicial proceedings” as they would have in the courts of that state, dates from the Act's passage in 1790.⁴⁹ Although there is scant history concerning the enactment of what is now section

44. Under the federal intramural standard, Rule 12(b)(6) dismissals are decisions on the merits, and thus are capable of generating claim preclusion. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981). The federal rule appears to be the same as that of many state courts—claim preclusion operates even when dismissal is brought about by curable defects in the pleading. 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4439, at 354 (stating that “most federal and state courts hold that the second action [brought on an improved complaint] is precluded”). But some state systems continue to follow what was once the majority rule and refuse to extend claim preclusion this far. *See, e.g., Gilbert v. Braniff Int'l Corp.*, 579 F.2d 411, 413 (7th Cir. 1978) (noting that an involuntary dismissal that allowed plaintiffs to file an amended complaint was not preclusive under Illinois state law).

45. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4467, at 642.

46. *See id.*; Lewis, *Mutuality in Conflict—Flexibility and Full Faith and Credit*, 23 DRAKE L. REV. 364, 369-70 (1974) (discussing *Hinchey v. Sellers*, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959) and explaining that the New York court applied collateral estoppel to evidentiary facts, although New Hampshire did not permit such application).

47. The federal court position appears to be that default judgments are incapable of generating issue preclusion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (stating that “judgment in the prior suit precludes litigation of issues *actually litigated* and necessary to the outcome of the first action”) (emphasis added); *see also* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4442, at 375-76 n.3 (stating that default judgments do not support issue preclusion when judgments are entered without further inquiry upon failure to answer).

New York's intramural system takes the opposite view—default judgments can support issue preclusion with reference to issues that might have been raised if the lawsuit had proceeded. D. SIEGEL, *HANDBOOK ON NEW YORK PRACTICE* 597 (1978); Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 174 (1969) (stating that New York decisions indicate “that defaults . . . foreclose matters that might have been raised and decided”).

New York's position may be so unfair that it is unconstitutional. *See infra* text accompanying notes 267-69. But if the New York rule is valid, the situation presents an example—perhaps the only one—of the federal intramural system opting for the *less* preclusive of two permissible options.

48. 28 U.S.C. § 1738 (1982). The text of the statute appears *supra* note 1.

49. Act of May 26, 1790, ch. 11, 1 Stat. 122. For the text of the original statute, see Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 60 (1957). Documents explaining the legislative history of the Act apparently were destroyed when the British burned the Capitol in 1814. *See id.* at 60 n.124. Amendments to the statute, reviewed in Nadelmann, *id.* at 81-86 and Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respec-*

Preclusion and Choice of Law

1738,⁵⁰ it seems clear that Congress intended to impose upon federal courts an obligation to recognize and enforce the judgments of states equivalent to the obligation imposed on sister states by the Constitution's full faith and credit clause⁵¹ to recognize and enforce sister-state judgments.⁵² The Supreme Court has interpreted the statute accordingly.⁵³

Congress has the authority to elaborate a more precise and systematic set of regulations for the intersystem enforcement of judgments.⁵⁴ Commentators have raised the idea,⁵⁵ but Congress has never really acted upon it; and, except in child custody cases,⁵⁶ section 1738 has remained the standard for regulating choice of preclusion law.

Several of the earliest federal cases considered article IV and section 1738 to do no more than repeat the requirement of the full faith and credit clause of the Articles of Confederation:⁵⁷ that judgments be taken

tive Roles of Due Process and Full Faith and Credit in the Interstate Context, 70 IOWA L. REV. 95, 95 n.2 (1984), have not altered the standard set forth in the text.

50. See Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 66 (1982); Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. REV. 59, 84 (1984). Documents making up the legislative history of the Act have been lost. Nadelmann, *supra* note 49, at 60 n.124.

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

52. Atwood, *supra* note 50, at 67; Degnan, *supra* note 3, at 743-44.

53. *E.g.*, *Davis v. Davis*, 305 U.S. 32, 40 (1939) ("The Act extended the rule of the Constitution to all courts, federal as well as state.").

Numerous articles have been written covering all or part of the history of judgment recognition from colonial times, through the Articles of Confederation, to the constitutional period. See Nadelmann, *supra* note 49; Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981); see also Degnan, *supra* note 3, at 742 n.5 (listing numerous authorities that discuss the evolution of the constitutional concept of full faith and credit); Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944) (providing a detailed analysis of the historical developments of the full faith and credit clause); Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 153 n.4 (1949) (listing authorities that discuss the history of the clause); Sumner, *Full Faith and Credit for Judicial Proceedings*, 2 UCLA L. REV. 441 (1955) (analyzing the advocacy of and defenses to a full faith and credit claim in judicial proceedings).

54. In addition to the authority ceded to Congress in art. IV, § 1 of the Constitution, other bases of legislative jurisdiction include the commerce clause, U.S. CONST. art. 1, § 8, and the privileges and immunities clause, U.S. CONST. art. IV, § 2. Insofar as federal judgments or federal enforcement by courts are involved, Congress' authority under article III is also implicated.

55. See R. LEFLAR, L. MCDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* 195 (1982); E. SCOLES & R. WEINTRAUB, *CASES AND MATERIALS ON CONFLICTS OF LAWS* 219 (2d ed. 1972); Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89.

56. The Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982), augments § 1738 by giving full faith and credit to state child custody decrees. For a discussion of the Act, see Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711 (1982).

57. The final paragraph of art. IV of the Articles of Confederation stated: "Full Faith and Credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State."

as prima facie evidence in subsequent proceedings.⁵⁸ Such an approach would have left federal courts free to apply their own law in determining the preclusive effects of state judgments. It was not long, however, before the Supreme Court rejected this view. In *Mills v. Duryee*,⁵⁹ the Court held that for a federal court to give full faith and credit to a New York state judgment it must identify and apply New York preclusion law.⁶⁰ Justice Story wrote: “[W]e can perceive no rational interpretation of the act . . . unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision.”⁶¹ In subsequent decisions, the Supreme Court reiterated that the statute in judgment-enforcement settings served as a choice-of-preclusion-law directive.⁶²

Today, federal courts will apply state preclusion law in most state-judgment cases. But two exceptions to this requirement exist and two more should be seriously entertained.

The first two exceptions are clearly established. Section 1738 does not require federal courts to give preclusive effect to a state court judgment when it would be unconstitutional to do so, or when another congressional enactment operates to suspend section 1738. Two further exceptions should exist. Federal courts should not be confined to state preclusion law when it is so undeveloped or confused that it does not suggest an answer. In addition, federal courts should be free to give greater effect to a state judgment than the rendering court would give, when doing so would not frustrate the purpose behind the state’s rule of lesser preclusion and would advance the purpose behind the federal forum’s rule of greater preclusion.

The first of these four exceptions acknowledges the obligation of federal courts to consider properly raised due process objections to insufficient notice or the lack of personal jurisdiction over nonresident defend-

58. For a review of cases so holding during the Articles of Confederation period, see Sumner, *supra* note 53, at 442 n.6. For early cases taking the same view under article IV of the Constitution and the full faith and credit statute, see Nadelmann, *supra* note 49, at 63-64; Sumner, *supra* note 53, at 443.

59. 11 U.S. (7 Cranch) 481 (1813).

60. “[I]t is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that state. It must, therefore, be conclusive here also.” *Id.* at 484.

61. *Id.* at 485.

62. See, e.g., *Union & Planter’s Bank v. Memphis*, 189 U.S. 71, 75 (1903) (stating that “[a]s the judgment pleaded had no force or effect in the Tennessee state courts other than as a bar to the identical taxes litigated in the suit, the courts of the United States can afford it no greater efficacy”); *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234 (1818) (reaffirming the *Mills* doctrine that a state court judgment has the same effect in federal courts as it does in other state courts); see also *infra* note 103 (citing other cases that apply the *Mills* doctrine); cf. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 135 (1912) (“The general effect of a judgment of a court of one State . . . is that which it has, by law or usage, in the courts of the State from which it comes.”).

Preclusion and Choice of Law

ants⁶³ in the prior state proceeding. Similarly, federal courts must consider whether the preclusion rule of the judgment-rendering state is so sweeping that it lacks the fundamental fairness that due process requires.⁶⁴ Because the state court that rendered the judgment would be required to entertain these same due process issues, a federal court may do so without denying the judgments full faith and credit.⁶⁵

63. RESTATEMENT (SECOND) OF JUDGMENTS § 86 comment c (1982); *cf.* *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982) (stating that § 1738 does not alter the inability of federal courts to "give preclusive effect . . . to a constitutionally infirm judgment").

Adequacy of notice and personal jurisdiction questions underlying the judgment may be raised if the judgment was obtained by default. This rule of general application was noted in RESTATEMENT (SECOND) OF JUDGMENTS § 65 (1982), and by the Supreme Court in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706-07 (1982).

Because a frequent consequence of insufficient notice is that the defendant learns of the original adjudication only after it has been reduced to a final judgment, collateral attack on notice grounds is freely available. RESTATEMENT (SECOND) OF JUDGMENTS § 65 comment b (1982). In contrast, the defendant is in a position to appreciate the personal jurisdiction issue as soon as he receives the summons and complaint. As a result, the defendant has the option of litigating in the forum selected by plaintiff or taking a default judgment and collaterally attacking it on jurisdictional grounds when it is presented for enforcement elsewhere (typically the defendant's home state).

It is essential that a defendant be permitted the option of taking a default judgment and collaterally attacking it on jurisdictional grounds. Whatever the claim-preclusive effect of a default judgment generally, *see supra* note 14, due process requires that a defendant's refusal to participate in the forum the plaintiff selected should not preclude him from subsequently attacking the judgment on personal jurisdiction grounds. On the one hand, under these circumstances, the "right to challenge jurisdiction makes [the defendant] an instrument for confining judicial authority to its prescribed limits." RESTATEMENT (SECOND) OF JUDGMENTS § 65 comment b (1982). On the other hand, if the defendant elects initially to challenge personal jurisdiction and is unsuccessful, that decision will preclude reexamination of the question when the judgment is presented for enforcement. *Insurance Corp. of Ireland*, 456 U.S. at 703-05; *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). Theoretically, preclusion law also should prevent collateral attack if the defendant omitted his jurisdictional challenge when participating in the initial proceeding. The tendency in such cases, however, is for courts to reach the same result simply by noting that defendant's participation in the initial proceeding operated as a consent to jurisdiction. *E.g.*, *Insurance Corp. of Ireland*, 456 U.S. at 703-05.

64. Due process usually protects strangers to the prior proceeding from preclusion. *See supra* note 16. Due process may also protect prior participants from unfair surprise. *Atwood*, *supra* note 50, at 70; *Casad*, *Intersystem Issue Preclusion*, *supra* note 6, at 524.

65. *See Jackson, Full Faith and Credit: The Lawyer's Clause*, 45 COLUM. L. REV. 1, 8 (1945); *Reese & Johnson*, *supra* note 53, at 165. The Supreme Court has observed that, in refusing enforcement to a state judgment on due process grounds, "other state and federal courts would still be providing a state court judgment with the 'same' preclusive effect as the courts of the State from which the judgment emerged." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982).

Due process developments are in a state of flux concerning the limits to be imposed on courts' personal jurisdiction. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court held that the due process clause allowed jurisdiction over nonresident defendants who could not be found and served in the forum state if, under the circumstances, the exercise of jurisdiction would be "reasonable and just, according to our traditional conception of fair play and substantial justice . . ." *Id.* at 320. The Court continues to struggle in an attempt to make this rather inchoate standard intelligible. The past two terms produced five decisions: *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). For a useful review of recent developments, *see Hay, Refining Personal Jurisdiction in the United States*, 35 INT'L & COMP. L.Q. 32 (1986).

Sister-state and federal courts are also under no obligation to enforce judgments that, for any other reason, would be denied enforcement by the state courts originally rendering them. *See A.*

The authority of federal courts to refuse enforcement of state judgments on due process grounds is beyond question. Important questions exist, however, concerning the prerequisites for the second exception and when or whether the third and fourth exceptions should apply. In addressing these questions, this Article begins with a recent case that presented the Supreme Court an opportunity to answer them: *Marrese v. American Academy of Orthopaedic Surgeons*.⁶⁶

III. The Supreme Court at the Crossroads: The *Marrese* Case

A. *The Decisions*

The American Academy of Orthopaedic Surgeons denied membership to Dr. Marrese and a competitor. They sued the Academy in Illinois state court, alleging breach of a duty (founded upon the Illinois Constitution and Illinois common law) to consider fairly their applications. The court dismissed their case for failure to state a claim. The plaintiffs then filed a federal antitrust suit in Illinois. The Academy moved to dismiss on the ground that the final judgments in the prior Illinois state case precluded the federal antitrust claims. After several district and circuit decisions, the Seventh Circuit, sitting en banc, decided that the claims were precluded.⁶⁷

Writing for a plurality of the court, Judge Posner acknowledged that plaintiffs' antitrust claims⁶⁸ could not have been presented in the prior state proceeding because they were within the exclusive jurisdiction of the federal court.⁶⁹ But, he noted, plaintiffs could have presented similar Illinois state antitrust claims in the prior suit.⁷⁰ Judge Posner suggested that if plaintiffs had initially joined state antitrust claims with the claims actually raised in the prior case, and if the state antitrust claims had been finally adjudicated, that would have precluded a subsequent federal adjudication of the federal antitrust claims.⁷¹ He contended that

VON MEHREN & D. TRAUTMAN, *supra* note 32, at 1596; *see also* Averill, *Choice-of-Law Problems Raised by Sister-State Judgments and the Full-Faith-and-Credit Mandate*, 64 NW. U.L. REV. 686, 688 (1969) (discussing the Revised Uniform Enforcement of Foreign Judgments Act of 1964); *cf.* Ford v. Ford, 371 U.S. 187, 192-93 (1962) (concluding that South Carolina courts were not required to give preclusive effect to a Virginia judgment because Virginia courts probably would not accord claim preclusion to dismissal of a child custody case).

66. 470 U.S. 373 (1985).

67. *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd*, 470 U.S. 373 (1985).

68. Plaintiffs brought suit under § 1 of the Sherman Act, 15 U.S.C. § 1 (1982). 726 F.2d at 1151. Their claims for damages and injunctive relief brought the case within the federal court's exclusive jurisdiction under § 15 and § 26. *See* 15 U.S.C. §§ 15, 26 (1982).

69. 726 F.2d at 1154.

70. *Id.* at 1153, 1155.

71. *Id.* at 1153-54.

Preclusion and Choice of Law

the result should not be different just because the state antitrust claims were not raised in the prior case.⁷²

The Supreme Court, in an opinion by Justice O'Connor, reversed the Seventh Circuit.⁷³ The Court stated that section 1738 requires a federal court considering the preclusive effect of a state judgment to begin its inquiry by examining state preclusion law.⁷⁴ The circuit court erred in disregarding Illinois state law.⁷⁵ Noting disagreement in the circuit opinions and between the parties over whether the prior judgment would be given claim preclusive effect under Illinois law, the Court remanded the case so that the district court might initially determine the content of Illinois preclusion law.⁷⁶

B. *The Statutory Exception Question*

The Constitution probably does not compel federal courts to recognize the preclusive effects of state judgments created under state law.⁷⁷ It

72. *Id.* at 1154-56. In his lengthy dissent, Judge Cudahy set forth the opposing view. *Id.* at 1173-83. He argued that the full faith and credit statute, 28 U.S.C. § 1738, requires federal courts to accept limitations that state preclusion law places on state judgments. Because he read Illinois decisions to follow the general principle that a court's judgments do not preclude claims that the court is not competent to adjudicate, and because Illinois state courts were not competent to adjudicate plaintiffs' federal antitrust claims, Judge Cudahy concluded that the prior adjudication was not preclusive under Illinois law. *Id.* at 1180. He further argued that, even if federal courts were free to give greater force to a state judgment, *Marrese* did not present the appropriate occasion for doing so for several reasons. Judge Cudahy saw material differences between the state and federal antitrust causes of action. As a more basic matter, he questioned the plurality's comparison of the Illinois and federal antitrust claims when the state antitrust claim had not been presented in the prior proceeding. Judge Cudahy was particularly concerned that the plurality's approach could lead to trial *in absentia* of federal antitrust claims in state proceedings. This, he felt, would undermine the goal of uniform interpretation and application of federal antitrust law intended by exclusive federal jurisdiction. For an extensive critique of the opinions of Judges Posner and Cudahy, see Comment, *The Claim Preclusive Effect of State Judgments of Federal Antitrust Claims: Marrese v. American Academy of Orthopaedic Surgeons*, 71 IOWA L. REV. 609 (1986).

Retired Justice Stewart (sitting on the Seventh Circuit by designation) voiced many of these criticisms in his dissent to an earlier *Marrese* decision that was subsequently vacated en banc. See *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1096-1100 (7th Cir. 1982). For a description of the complex subsequent history and vacation of this case, see 726 F.2d at 1152.

73. 470 U.S. 373 (1985). The Justices voted 7-0 in favor of reversal with Justices Blackmun and Stevens not participating in the decision. Chief Justice Burger filed a separate opinion.

74. The point is made at least three times in the Court's opinion, see *id.* at 375, 380-81, 386, and also in the Chief Justice's concurrence, see *id.* at 387.

75. *Id.* at 375.

76. *Id.* at 387.

77. Article IV of the Constitution imposes a full faith and credit obligation only upon sister states. See *supra* note 51. Perhaps it could be argued that, in the absence of the full faith and credit statute, the tenth amendment would place some obligation on federal courts to respect state judgments. Even during the halcyon period of tenth amendment law, however, when *National League of Cities v. Usery*, 426 U.S. 833 (1976), was in force, the argument would not have been easy to make. And the climate for the argument worsened considerably when the Court, in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), overruled *National League of Cities*. For a discussion of *Garcia*, see Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985).

follows that Congress did not have to enact the original full faith and credit statute, and that it is free either to repeal it or to lighten its obligations by amending it to create exceptions. As the law now stands, however, section 1738 contains no exceptions.⁷⁸ One must look for exceptions in other federal statutes. For example, Congress has expressly suspended the full faith and credit requirement in the federal habeas corpus statute.⁷⁹ But the question will more often be whether suspension, though not expressly required, is necessary to effectuate the purposes for a statutory grant of exclusive federal jurisdiction. In short, should a court imply an exception to the mandate of section 1738?

Because Congress has not expressly suspended the preclusive effect of state judgments in subsequent federal antitrust cases,⁸⁰ *Marrese* provided the Supreme Court with precisely the kind of implied-exception issue that has divided commentators⁸¹ and generated uncertainty in the lower federal courts.⁸² But the Court declined to resolve the issue, stat-

78. For the text of the statute, see *supra* note 1. It is clear that the "full faith and credit" obligation of the statute requires at the very least that federal courts give as much preclusive effect to state judgments as would the courts that rendered them. See *infra* note 103.

79. 28 U.S.C. § 2254 (1982); see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 245 (Supp. 1981); Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 330, 333 (1978).

80. The exclusive character of federal antitrust jurisdiction has itself arisen through judicial interpretation instead of express statutory language. See *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 287 (1922); *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440-41 (1920).

For examples of exclusive federal jurisdiction clearly expressed by statute, see 28 U.S.C. § 1338(a) (patent and copyright actions); 28 U.S.C. § 1346(f) (actions to quiet title to real estate to which the United States claims an interest). The American Law Institute recommended that exclusive federal antitrust jurisdiction also be expressed by statute. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 24-25 (1969) [hereinafter cited as ALI STUDY].

81. Compare *Vestal*, *supra* note 9, at 374-75 (arguing for preclusion when plaintiff has choice of forum) and Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281, 1290-91 (1978) (arguing for preclusion because of federal power of pendent jurisdiction) [hereinafter cited as Note, *Estoppel—Exclusive Jurisdiction*] and Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360, 1385 (1967) (arguing for preclusion when plaintiff initially elects to file in a court of limited jurisdiction) [hereinafter cited as Note, *Exclusive Jurisdiction—State Court*] with *Atwood*, *supra* note 50, at 63 (arguing against preclusion because of exclusive jurisdiction) and *Burbank*, *Afterwords: A Response to Professor Hazard and a Comment on Marrese*, 70 CORNELL L. REV. 659, 664 (1985) (arguing that in exclusive jurisdiction cases, federal courts should be able to adopt their own preclusion rules) and Comment, *Collateral Estoppel Effect of State Court Judgments in Federal Antitrust Suits*, 51 CALIF. L. REV. 955, 965 (1963) (stating that the inadequacies in the procedures of the first court should overcome any need for strict preclusion) [hereinafter cited as Comment, *State Judgments—Federal Antitrust*] and Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 514-15 (1957) (arguing against preclusion because of the insulating effect of exclusive federal jurisdiction) [hereinafter cited as Note, *Exclusive Jurisdiction—Private Actions*]. The American Law Institute has come out clearly against preclusion in this context. See RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment e, § 26 comment c, illustration 2 (1982).

82. *Atwood*, *supra* note 50, at 62; see 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5,

Preclusion and Choice of Law

ing that such a determination would be necessary only if the inquiry into state law on remand led to the conclusion that the prior judgment was preclusive under Illinois law.⁸³

Marrese did work one change in the law. Federal courts will no longer be able to ignore section 1738 when considering the implications of exclusive federal jurisdiction on the enforceability of state judgments.⁸⁴ It is unfortunate, however, that the Court's opinion does not shed more light on how federal courts should frame and resolve implied statutory-exception issues.⁸⁵

The Court did offer the following general observation concerning the approach that should be taken on remand:

[Resolving] whether the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied partial repeal of § 1738 . . . will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action. Our previous decisions indicate that the primary consideration must be the intent of Congress.⁸⁶

The opinion, however, provides little specific guidance beyond a review of the sketchy picture that the Court's earlier decisions created. As it had already suggested in *Kremer v. Chemical Construction Corp.*,⁸⁷ the Court rejected the idea that exclusive federal jurisdiction invariably creates an exception to section 1738.⁸⁸ At the same time, the Court seemed, through its use of *Brown v. Felsen*,⁸⁹ to confirm that implied statutory exceptions to section 1738, at least theoretically, are possible.⁹⁰

§ 4470. Compare *RX Data Corp. v. Department of Social Servs.*, 684 F.2d 192 (2d Cir. 1982) (exclusive jurisdiction exercised notwithstanding a state judgment) and *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981) (same), *cert. denied*, 455 U.S. 921 (1982) with *Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347 (9th Cir. 1983) (state judgment given preclusive effect notwithstanding exclusive jurisdiction) and *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981) (same).

83. 470 U.S. 373, 386.

84. Like the Seventh Circuit in *Marrese*, the majority of lower federal court cases had made no reference to section 1738. See 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4470.

85. In his concurrence, Chief Justice Burger chided the Court for failing to provide more guidance to the district court. 470 U.S. at 387.

86. *Id.* at 386 (citations omitted).

87. 456 U.S. 461 (1982). The Court applied § 1738 although it refused to decide whether plaintiff's Title VII suit was within the exclusive jurisdiction of the federal court. *Id.* at 506 n.20.

88. As the *Marrese* Court noted, "*Kremer* implies that absent an exception to § 1738, state law determines at least the issue preclusive effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts." 470 U.S. at 381.

89. 442 U.S. 127 (1979).

90. The *Marrese* Court, juxtaposing *Brown* with *Kremer*, described *Kremer* as "finding no congressional intent to depart from § 1738 for purposes of Title VII" and *Brown* as "finding congressional intent that state judgments would not have claim preclusive effect on dischargeability issue in bankruptcy." 470 U.S. at 386. In *Brown*, the Supreme Court considered the effect of a prior state adjudication in a federal bankruptcy proceeding under § 17 of the Bankruptcy Act, 11 U.S.C. § 35 (1976) (repealed 1978). Curiously, though the *Brown* Court made no reference to the full faith and

C. *The Greater Preclusion Question*

The *Marrese* Court refused to entertain the possibility that the federal court could give claim-preclusive effect to the Illinois judgments, even though the state judgments would not be preclusive under Illinois law.⁹¹ Presumably, Congress could divest federal courts of the power to augment the preclusive effect of state judgments.⁹² Twice in *Marrese* the Court seemed to be saying that this was the effect of section 1738.⁹³

But *Marrese's* cursory treatment of the greater preclusion question only perpetuates doctrinal confusion created by several recent Supreme Court cases. *Kremer v. Chemical Construction Corp.*⁹⁴ and *Migra v. Warren City School District Board of Education*⁹⁵ suggested that federal

credit statute, it did declare: "While Congress did not expressly confront the problem created by prebankruptcy state-court adjudications, it would be inconsistent with the philosophy of the 1970 amendments to adopt a policy of res judicata which takes these [§ 17] questions away from bankruptcy courts and forces them back into state courts." 442 U.S. at 136; see also *Atwood*, *supra* note 50, at 73-75 (discussing the significance of *Brown* to § 1738 litigation).

91. The Court stated that § 1738

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

470 U.S. at 380 (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982)). That this rule has "long been established" is a questionable assertion. See *infra* notes 106-07. Later the Court asserted that, in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), it had rejected "the view that § 1738 allows a federal court to give a state court judgment greater preclusive effect than the state courts themselves would give to it." 470 U.S. at 384; see also *id.* at 388 (Burger, C.J., concurring) (citing *Migra* for the proposition "that a federal court is not free to accord greater preclusive effect to a state court judgment than the state courts themselves would give to it").

92. Congress' authority to do so can be traced from article III of the Constitution. Article III reposes the power to create lower federal courts in Congress, and it has long been clear that federal courts may exercise only as much power as Congress has elaborated in subject matter jurisdiction statutes. *E.g.*, *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850). From Congress' authority to grant jurisdiction to federal courts must be implied authority to diminish the courts' power. Congress may do this by repealing grants of subject matter jurisdiction or by restricting the availability of judicial remedies. See generally Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 507-11 (1928) (providing a history of the statutes that have defined federal jurisdiction over federal question cases). For example, the authority of Congress to withdraw the power of the federal courts to issue injunctions is beyond question. See *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). The authority of Congress to impose choice-of-law directives on federal courts is equally clear. The most prominent example is the Rules of Decision Act, 28 U.S.C. § 1652 (1982), which requires federal courts to apply the "laws of the several states . . . as rules of decision in civil actions" unless the federal constitution, statutes, or treaties "otherwise require or provide."

93. See 470 U.S. at 383, 386.

94. 456 U.S. 461 (1982). *Kremer* held, "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged." *Id.* at 466. One commentator has gone so far as to read *Kremer* as making "federal doctrine . . . irrelevant." Smith, *supra* note 50, at 72.

95. 465 U.S. 75 (1984). The *Migra* Court declared, "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Id.* at 81; see also *id.* at 88 (White, J.,

Preclusion and Choice of Law

courts may not increase the preclusive effects of state judgments.⁹⁶ But an intervening decision, *Haring v. Prosise*,⁹⁷ appears neatly to counterbalance the implications of these two decisions. In *Haring*, the Court devoted several pages to discussing whether, on grounds of federal policy, it could justify giving preclusive effect to a Virginia judgment when Virginia law would not.⁹⁸ The Court decided against preclusion, but this discussion suggests that when section 1738 does not require preclusion because the judgment would not be preclusive under state law, preclusion supported by federal doctrine remains a possibility. If section 1738 stood as a per se bar to greater preclusion, the Court's discussion would have been pointless.⁹⁹ In its crude way, *Marrese* may have tied the hands of federal judges whenever they are called upon to give greater preclusive effect to state judgments. Analytically, however, *Marrese* preserves the dichotomy between *Haring* and the *Kremer* and *Migra* decisions by citing all three cases with approval.¹⁰⁰

concurring) (citing authorities for the proposition that a federal court may not increase the preclusive effects of state judgments).

96. It should be noted, however, that the greater preclusion issue was not before the Court in *Kremer*, because the Court was satisfied that the New York judgment was preclusive under state law. 456 U.S. at 466-67. And, the Court's analysis in *Migra* suggests that Ohio courts probably would have regarded their judgment as preclusive as well. See 465 U.S. at 87. Both decisions focused on the obligation of federal courts under § 1738 to give *as much* preclusive effect to a state judgment as that judgment would have in the state courts that rendered them.

97. 462 U.S. 306 (1983).

98. *Id.* at 317-23. The Court similarly commented on the desirability of giving greater preclusive effect to the Illinois judgment in *Marrese*. Noting the position of the *Restatement (Second) of Judgments* against preclusion in cases like *Marrese*, the Court said: "[W]here state preclusion rules do not indicate that a claim is barred, we do not believe that federal courts should fashion a federal rule to preclude a claim that could not have been raised in the state proceedings." 470 U.S. at 384 n.3. Later the Court observed:

We are unwilling to create a special exception to § 1738 for federal antitrust claims that would give state court judgments greater preclusive effect than would the courts of the State rendering the judgment. Cf. *Haring v. Prosise* . . . (refusing to create special preclusion rule for § 1983 claim subsequent to plaintiff's guilty plea).

Id. at 384. And, it labeled as "debatable" the contention that the court of appeals' approach in *Marrese* would advance federal policies of economy and consolidation. *Id.* at 385.

99. The *Haring* Court seems to have made a distinction between the function of § 1738 in authorizing or explaining a choice of preclusion law and the function of the statute in limiting choices. The Supreme Court suggested that federal judges must follow § 1738 when they are faced with state judgments that would be preclusive where rendered; in such cases § 1738 explains the selection of state preclusion law. 462 U.S. at 313. However, at least in cases in which state courts would not regard the judgment as preclusive, § 1738 does not *require* federal courts to apply only state preclusion law. See *id.* at 314 n.8. That the Court ultimately declined to create a federal preclusion rule is immaterial. Its very willingness to entertain the argument supports the authority of federal courts—at least in some cases—to give greater preclusive effect to state judgments than would the courts of the state rendering the judgment. For a more extensive discussion of the limiting effect of *Haring* on § 1738 in greater preclusion cases, see *infra* text accompanying notes 237-44.

100. 470 U.S. at 380, 384-86. Since *Marrese*, however, the Supreme Court seems to have gone further toward reading § 1738 as a categorical denial of federal court authority to give greater preclusive effect to state judgments. In *Parsons Steel, Inc. v. First Ala. Bank*, 106 S. Ct. 768, 771-72 (1986), the Court reiterated the restrictive view it had taken in *Kremer*, *Migra*, and *Marrese*. Writing in *Parsons* for a unanimous court, Justice Rehnquist made no reference to *Haring*.

The problem is one of statutory interpretation. It is clear that, subject to constitutional restraints¹⁰¹ and the possibility of a statutory exception,¹⁰² section 1738 requires federal courts to give state judgments as much preclusive effect as they would have under state law.¹⁰³ This interpretation is essential to preserve the authority of the state judgment-rendering courts¹⁰⁴ and to realize the statute's goal of establishing a parity of obligation between state and federal enforcement courts.¹⁰⁵ These policies fail to explain, however, why the statute's full faith and credit obligation also should compel federal courts to honor the limitations of state preclusion law.

This is not to say that section 1738 is or should be without application in the latter situation. It is just that a separate rationale for explaining—and perhaps limiting—its application must be found.¹⁰⁶ The Supreme Court renewed its interest in section 1738 as a choice-of-preclusion-law directive only recently.¹⁰⁷ The Court has yet to discuss, how-

101. See *supra* notes 63-65 and accompanying text.

102. See *supra* note 79 and accompanying text.

103. The Supreme Court first asserted that § 1738 requires a federal court to give at least as much preclusive effect to a judgment as it would receive in the court that rendered it in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813) *discussed supra* notes 59-61 and accompanying text. The rule has been restated in numerous cases. *E.g.*, *Haring v. Prosis*, 462 U.S. 306, 313 (1983); *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Covington v. First Nat'l Bank*, 198 U.S. 101, 109 (1905). The *Allen* Court put the matter simply, observing of § 1738: "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . ." 449 U.S. at 96.

104. If other judicial systems could ignore the local authority of a state court's judgments, the stature of that court would be impaired, and it would be impossible to find repose through the formal resolution of controversies. Authorities are in unanimous agreement that these are central purposes of preclusion. See *supra* note 32; see also *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 383, 385 (1985) (discussing the importance of giving repose to state judgments); *cf.* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4403, at 15 ("Repose is the most important product of *res judicata*."). The Supreme Court has placed a similar premium on repose regarding federal judgments. See *Nevada v. United States*, 463 U.S. 110, 128-29 (1983) (discussing the importance of giving repose to federal judgments).

105. See *supra* notes 51-53 and accompanying text.

This assumes that an investigation of state preclusion law either yields an answer to the preclusion question or at least establishes a predicate for concluding how courts of the state would view their own law under the same or substantially similar circumstances. See *infra* text following note 124. If, instead, state law is unavailing, federal courts probably should be permitted to chart an independent course. See *infra* note 146 and accompanying text.

106. Uncertainty over how much state preclusion law § 1738 ought to require federal courts to apply has been noted elsewhere. See *Atwood, supra* note 50, at 71-72; *Casad, Intersystem Issue Preclusion, supra* note 6, at 521-23; *Casad, Introduction to Symposium: Preclusion in a Federal System*, 70 CORNELL L. REV. 599, 600 (1985).

107. Before *Allen v. McCurry*, 449 U.S. 90 (1980), the Supreme Court had on occasion dealt with prior state adjudications without utilizing state preclusion doctrine or § 1738. See *Brown v. Felsen*, 442 U.S. 127 (1979); *Montana v. United States*, 440 U.S. 147 (1979); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). In *Montana*, the Supreme Court decided, without referring to § 1738, that a federal *res judicata* doctrine gave issue-preclusive effect to a Montana judgment against the United States. Although defensible, the holding did represent a departure from the general rule that issue preclusion cannot be used to bind strangers to the prior

Preclusion and Choice of Law

ever, the greater preclusion problem thoughtfully or at any length. It is hoped that the Court will acknowledge through its interpretation of section 1738 the need to give different treatment to greater preclusion cases.

D. *Looking Ahead*

Notwithstanding the criticisms of some commentators,¹⁰⁸ recent cases¹⁰⁹ prior to *Marrese* probably have been correct in requiring state preclusion law to be followed.¹¹⁰ Under the circumstances presented in *Marrese*, the Court also seems correct in ruling out the possibility that greater effect could be given to the Illinois judgment.¹¹¹

But it is regrettable that the Supreme Court has not developed an interpretive approach that explains and harmonizes its various comments on section 1738. Because of the absence of a cohesive analysis, the Court's decisions shed insufficient light on how different and more diffi-

adjudication. *See supra* note 16. The only Montana preclusion case cited by the Court did not bear on this issue, and it is unclear whether the Montana courts would have reached the same conclusion. The Court commented that "considerations of comity as well as repose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court." 440 U.S. at 163. The Court's general approach in *Montana*, however, was to treat the preclusion issue as if it had arisen in a federal intramural setting, and the Court cited a number of federal-judgment cases, including *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322 (1955); *United States v. Moser*, 266 U.S. 236 (1924); *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294 (1917); *G. & C. Merriam Co. v. Sallfield*, 241 U.S. 22 (1916); and *Southern Pac. R.R. v. United States*, 168 U.S. 1 (1897). Numerous lower federal court decisions also have gauged the preclusive effects of state judgments by federal intramural doctrine. *See, e.g.*, *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 666 (11th Cir. 1984) (using principles of federalism in deciding not to give preclusive effect to state adjudication of constitutionality of state statute); *Red Fox v. Red Fox*, 564 F.2d 361, 365 (9th Cir. 1977) (using federal standards to deny preclusive effect to state court adjudication of claim under Indian Civil Rights Act, 25 U.S.C. §§ 1303-1305 (1970)); *Drier v. Tarpon Oil Co.*, 522 F.2d 199, 200 (5th Cir. 1975) (using federal standards to preclude relitigation in federal securities law case of issue of fact decided in a prior state judgment).

Some commentators assert that it is improper to view § 1738 as a choice-of-preclusion-law directive. *See, e.g.*, Burbank, *supra* note 3, at 625 ("I believe that the full faith and credit statute does not provide or choose preclusion law." (footnote omitted)); Comment, *The Collateral-Estoppel Effect to Be Given State-Court Judgments in Federal Section 1983 Damage Suits*, 128 U. PA. L. REV. 1471, 1492 (1980) ("Section 1738 provides a weak statutory basis on which to build a system of preclusion jurisprudence.").

Professor Burbank, in his interesting article, offers a choice-of-preclusion-law approach derived from an interplay of federal common law and the Rules of Decision Act, 28 U.S.C. § 1652 (1982). Although his arguments are imaginative, he has not yet demonstrated why § 1738 is an unsuitable mechanism for regulating choice of preclusion law. And I agree with Professor Hazard that there are serious questions concerning the plausibility of Professor Burbank's § 1652 theory. Hazard, *supra* note 4, at 642-46. For the most recent presentation of Professor Burbank's views, see Burbank, *Interjurisdictional Preclusion, Full Faith and Credit, and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986).

108. *See infra* notes 183, 191, 197, 198, 206.

109. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

110. *See infra* notes 195-201 and accompanying text.

111. *See infra* notes 280-92 and accompanying text.

cult federal cases should be decided in the future. In addition, the Supreme Court needs to elaborate more fully a standard to aid federal courts in determining when state preclusion law is so indecisive on the questions before them that it may be disregarded. The balance of this Article explores some of the possibilities for new development in this area.

IV. The Process of Honoring State Preclusion Law Under Section 1738

A. *State Law as a Beginning Point*

The Court's opinion in *Marrese* should eliminate the last vestiges of resistance to the rule that section 1738 requires federal courts presented with state judgments to consider state preclusion law. As recently as 1979, the Supreme Court's own decisions provided examples of federal judicial independence from section 1738.¹¹² In the following year, however, the Court signaled the reemergence of section 1738 as a force in such cases.¹¹³ Three subsequent cases stressed the importance of state preclusion law to the application of section 1738.¹¹⁴ *Marrese* makes it clear that not only must state preclusion law be examined, but, in most if not all cases, the inquiry must begin there.¹¹⁵

In *Marrese*, this meant that an investigation of Illinois preclusion law had to precede the determination of whether an exception to section 1738 should be implied from exclusive federal antitrust jurisdiction. The Supreme Court sought to justify this sequence by suggesting that if the judgment was not preclusive under Illinois law, there would be no need for answering the implied-exception question.¹¹⁶

Of course, the converse of this proposition makes just as much sense. If the Court had begun with the implied-exception issue and had

112. See *supra* note 107.

113. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). The Court left open, however, the question of how the issue preclusive effect of the Missouri judgment was to be evaluated. *Id.* at 105 n.25.

114. See *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984); *Haring v. Prosis*, 462 U.S. 306, 314 (1983); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 & n.6 (1982). For a useful summary of these decisions, see Smith, *supra* note 50, at 65-81.

115. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 375, 381, 386 (1985).

In certain situations, it may be desirable to differentiate claim preclusion from issue preclusion in determining whether to apply the preclusion law of the place of the judgment. See 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4467, at 625, 641, 645-46. In several cases, however, the Supreme Court has resisted such a distinction when discussing § 1738. See *Marrese*, 470 U.S. at 383; *McDonald v. City of W. Branch*, 466 U.S. 284, 287-89 (1984); *Migra* 465 U.S. at 83-84; cf. *Atwood*, *supra* note 50, at 69 ("Although it has been suggested that issue preclusion may operate with less force than does claim preclusion under § 1738, the cases do not support such a distinction.").

116. 470 U.S. at 383.

Preclusion and Choice of Law

concluded that an exception to section 1738 existed, a subsequent inquiry into the content of Illinois state preclusion law would have been unnecessary. The federal case would be insulated from Illinois preclusion doctrine in order to protect exclusive antitrust jurisdiction.

Perhaps the Supreme Court's emphasis on the state-law inquiry as the correct starting place, even in *Marrese*, is little more than a point of intersystem etiquette; or it may be a manifestation of more substantial concerns of comity and federalism.¹¹⁷ The Court's state-law preoccupation may also be a byproduct of a battle of wills between the Supreme Court and its hierarchal inferiors over whether to take section 1738 seriously as a choice-of-law directive. Some federal courts of appeal have seemed particularly slow to respond to the message of earlier decisions¹¹⁸ concerning the significance that section 1738 gives to state preclusion law.¹¹⁹

B. *Determining the Content of State Preclusion Law—The Insignificance of the Marrese Paradox and the Emergence of a Useful Rule*

Perhaps the most serious objection to *Marrese's* insistence on the examination of Illinois state preclusion law is that, because of a paradox created by the exclusive character of federal antitrust jurisdiction, it is impossible for the same preclusion question ever to come up in the Illinois state courts. If plaintiffs had filed their federal antitrust complaints in state rather than federal court, the Illinois courts would not have had subject matter jurisdiction to rule on the claim preclusive effect of the prior Illinois judgments. Judge Posner used this point to justify using federal rather than state preclusion law.¹²⁰ The Supreme Court insisted that this paradox made no difference:

To be sure, a state court will not have occasion to address the

117. The *Marrese* Court noted that the full faith and credit statute "embodies concerns of comity and federalism." *Id.* at 380. The Court made a similar observation in *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

In a different context, the Supreme Court invoked concerns of federalism in ruling that federal courts should *not* adjudicate questions of state law. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105-06 (1984) (eleventh amendment bars federal court adjudication of state claims against state officials); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

118. See *supra* notes 113-14 and accompanying text.

119. Judge Posner's plurality opinion in *Marrese* is an example. See *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) *rev'd*, 470 U.S. 373 (1985); see also *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 666-67 (11th Cir. 1984) (invoking federal rather than Georgia law to determine the issue-preclusive effect of a Georgia state judgment).

120. See *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1154 (7th Cir. 1984) (plurality opinion). Professor Burbank takes the same position. See Burbank, *supra* note 81, at 664 & n.3.

specific question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court. Nevertheless, a federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation.¹²¹

Judge Posner's abortive attempt to finesse the state law question draws attention to a frailty in the Court's emerging section 1738 analysis. *Marrese* and other recent cases make clear that the Court has imposed a bifurcated regime of preclusion law on federal courts. In the intramural sphere, the preclusive effect of federal judgments usually will be determined by consulting federal doctrine.¹²² In the intersystem sphere, the preclusive effect of state judgments usually will be determined by consulting state doctrine.¹²³ But surely this cannot mean that federal courts are confined to state law when state preclusion law is so undeveloped or so hopelessly confused that it cannot provide an answer.

Because of the featured role that its recent section 1738 decisions give to state preclusion law, the Court will have to deal with this problem. The Court's response in *Marrese* was less definitive than the Chief Justice wished,¹²⁴ but the Court did offer at least the beginnings of a sensible choice-of-preclusion-law approach. By acknowledging that state preclusion law could provide answers in cases not subject to state court adjudication, the Court evinced a willingness to honor the spirit as well as the letter of state law in section 1738 cases. With further judicial refinement, this approach could lead to a rule that, absent a statutory exception, section 1738 requires that state judgments be preclusive in federal court whenever the conclusion of preclusion is suggested from an examination of state preclusion law. This rule will facilitate the application of state preclusion law when federal courts are exercising jurisdiction concurrent with that of state courts, and it will also extend to situations in which, because of a disability created either by federal or local law, courts of the state could not exercise jurisdiction over the same case. What matters is whether, by examining the whole of state preclusion law, the federal court can derive an answer for the case at hand.

Judge Posner's approach seems superficial in contrast. It was a mistake for him to rely on the paradox created by exclusive federal antitrust jurisdiction as an a priori demonstration of the inability of Illinois state preclusion law to provide guidance in *Marrese*. Taken to its logical conclusion, Judge Posner's position extends well beyond exclusive-jurisdic-

121. 470 U.S. at 381-82.

122. See *supra* notes 3-5 and accompanying text.

123. See *supra* subpart II(B).

124. See *supra* note 85.

Preclusion and Choice of Law

tion settings. It suggests that, in determining the preclusive effect of state judgments, federal courts must give weight to state decisions only when they are entirely on point. This reading of section 1738 as a choice-of-law directive is too technical and narrow. Respect for the state origin of the judgment requires federal courts to examine all of the state's preclusion law.¹²⁵ Granted, the paradox created by exclusive federal jurisdiction might make an examination of state preclusion law more difficult,¹²⁶ but, if *Marrese* serves as a guide, these difficulties may not be insurmountable.

One question that Illinois law might help answer is whether a state court may preclude by its judgment matters that it would have been incompetent to adjudicate.¹²⁷ Inasmuch as the authority of a particular state court to adjudicate can be limited by state as well as federal law, this is a question that Illinois can answer through its intramural preclusion doctrine.¹²⁸ Illinois law also might indicate whether the relationship between plaintiff's federal antitrust claims and the Illinois constitutional and common-law claims adjudicated in the prior proceeding is sufficient

125. When no case on point can be found, it is always appropriate for a federal court to search elsewhere in state preclusion law for guidance. Consider the example provided by *Haring v. Prosis*, 462 U.S. 306 (1983), a case brought within the federal court's concurrent jurisdiction. The Supreme Court was faced with a specific preclusion issue that the Virginia courts could have (but had not) addressed. The Court adopted the same approach it later took in *Marrese*, stating: "Because there is no Virginia decision precisely on point, we must look for guidance to Virginia decisions concerning collateral estoppel generally." *Id.* at 314.

The problem is really no different from that posed by the *Marrese* paradox in reverse: when should a state court should use federal law to determine the preclusive effect of a federal judgment in a case a federal court would never hear? Such cases would seem to pose no insurmountable obstacle in reaching the conclusion that federal preclusion law controls. For example, see the discussion of the claim-preclusive effect of a federal judgment on a subsequent state court adjudication of state antitrust claims that could have been (but were not) offered in the federal suit under a theory of pendent jurisdiction. *Infra* notes 282-84 and accompanying text.

126. The number of federal preclusion cases purporting to follow state law suggests that frequently it will not be difficult to ascertain and apply state preclusion law. See generally 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4469 (providing an annotation of such cases). For a discussion of the general process of ascertaining state law, see Note, *Federal Interpretation of State Law—An Argument for Expanded Scope of Inquiry*, 53 MINN. L. REV. 806 (1976).

127. The *Marrese* Court suggested that "[t]o the extent that state preclusion law indicates that a judgment normally does not have claim preclusive effect as to matters that the court lacked jurisdiction to entertain, . . . a state court judgment does not bar a subsequent federal antitrust claim." 470 U.S. at 383.

128. In determining Illinois law on this point on remand, the courts are likely to give attention to *Spiller v. Continental Tube Co.*, 95 Ill. 2d 432, 447 N.E.2d 834 (1983), in which the Illinois Supreme Court stated that preclusion extended "not only to questions which were actually litigated but also to all questions which could have been raised or determined." *Id.* at 432, 447 N.E.2d at 838. Petitioners urged in argument before the United States Supreme Court that *Spiller* carried the negative implication that the original adjudication could preclude only questions that could have been raised in that adjudication. Joint Reply to the Brief of the American Academy of Orthopaedic Surgeons in Opposition to the Joint Petition for a Writ of Certiorari at 2, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). Respondent argued that *Spiller* did not invite such a reading. Brief for Respondent at 11.

to support preclusion.¹²⁹ Although the paradox¹³⁰ will prevent Illinois courts from comparing a successive federal antitrust claim with prior state claims, Illinois courts can compare the prior state claims with a subsequent claim under Illinois' similar state antitrust statute.¹³¹

Whether a search actually leads to disclosure of Illinois precedents shedding light on these two questions is beside the point. Federal courts directed by section 1738 to examine state preclusion law always face the possibility that state doctrinal developments may not reach questions raised in the case at hand. Analytic difficulties resulting when this happens are reminiscent of those that federal courts encounter under the Rules of Decision Act.¹³² But, because of the difference in the force of the two choice-of-law directives, it should be much easier for federal courts to revert to federal law in truly problematic cases under section 1738 than it would be in cases under section 1652.

There is a significant difference between the power of Congress to choose between choice-of-law approaches for the recognition of state rules of decision and for the recognition of state preclusion law. Concerning state rules of decision, the Supreme Court has held, beginning with *Erie Railroad v. Tompkins*,¹³³ that federal judges could not displace state substantive law merely because their diversity jurisdiction had been invoked. One can argue that a reading of the Rules of Decision Act less deferential to state law than the one given in *Erie* would be unconstitutional.¹³⁴ In contrast, Congress enjoys much greater latitude in deter-

129. For an explanation of how claims are compared under the doctrine of claim preclusion, see *supra* notes 8-13 and accompanying text.

130. See *supra* notes 120-21 and accompanying text.

131. The more alike the state and federal statutes are, the more useful will be the analogy. See *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1176 n.8 (7th Cir. 1984) (Cudahy, J., dissenting) (listing several Illinois cases that plaintiff cited for the proposition that Illinois courts would not bar a subsequent suit under the state antitrust statute), *rev'd*, 470 U.S. 373 (1985).

132. 28 U.S.C. § 1652 (1982). Section 1652 questions are usually discussed by reference to the doctrine of interpretation evolving from *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Ascertaining state law when it is "confused or nonexistent" is a chronic problem under *Erie*. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290 (1946). Professor Smith has suggested that inquiries about state preclusion law may be, on the whole, less problematic than state law inquiries under the *Erie* doctrine. Smith, *supra* note 50, at 111. Certainly, some *Erie*-mandated inquiries are of surpassing difficulty. For example, federal diversity judges are required under *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), to apply state conflicts law. Because of the inherent difficulty of conflicts doctrine and distortions brought about by local choice-of-law bias, it may be very hard to determine the law's content. See Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327, 339 & n.63 (1982).

133. 304 U.S. 64 (1938).

134. *Erie* overruled *Swift v. Tyson*, 41 U.S. 1 (1842). *Swift* had read the Rules of Decision Act to permit federal diversity courts to devise and apply their own general common law instead of applying the decisional law of the forum state. Writing for the Court in *Erie*, Justice Brandeis addressed *Swift* in the following inanner: "If only a question of statutory construction were in-

Preclusion and Choice of Law

mining how much recognition federal courts must give to state judgments. The Constitution might even allow Congress to repeal section 1738 and permit federal courts to ignore state judgments altogether.¹³⁵

Because Congress has a wider scope of permissible options under section 1738 and because the statute's interpretation is still unsettled,¹³⁶ the Supreme Court presently has flexibility in developing a choice-of-law approach for section 1738. If state preclusion law is undeveloped or hopelessly unclear, it should not be difficult for the Court to approve application of federal preclusion law.

In his *Marrese* concurrence, Chief Justice Burger appeared to endorse a measure of federal-court autonomy when state preclusion law was not helpful.¹³⁷ He stressed the importance of certainty to the goal of

involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." 304 U.S. at 77-78. Although subsequently noting that *Erie* "indicated that Congress does not have the constitutional authority to make law that is applicable to controversies in diversity of citizenship cases," *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 202 (1956), the Supreme Court has not chosen to clarify or refine the point.

A number of commentators have endorsed the suggestion in *Erie* that the decision was necessary to preserve a constitutional principle. See, e.g., Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 392-98 (1964) (stating that the constitutional ground taken in *Erie* was not only right, but also the only tenable ground that could be taken); Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1688 (1974) (observing that the constitutional underpinnings of *Erie* constitute the essential unity of the decision); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 239 n.121 (1948) (stating that the constitutional language of *Erie* was necessary to correct an act of usurpation); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1086 (1964) (arguing that the constitutional decision in *Erie* was "consonant with the basic premises of American federalism"). Others have questioned the premise. See, e.g., Clark, *supra* note 132, at 278-79 (observing that "it seems clear that Congress may determine the manner and form of adjudication of rights which under the Constitution may be committed to the federal courts"); Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 197 (1957) (stating that "the Court's decisions offer little guidance as to the position it will adopt if called upon to determine whether *Erie* announces a constitutional limitation on the power of Congress and the federal courts"); cf. ALI STUDY, *supra* note 80, at 442 (noting that "it does not necessarily follow that the *Erie* holding was constitutionally compelled in the technical sense of being legally imposed by the fundamental instrument"); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (suggesting a less restrictive role for the Constitution and a commensurately greater range of choice-of-law options for Congress). For an excellent overview of the subject, see C. WRIGHT, *supra* note 25, at 359-64.

135. See *supra* note 77 and accompanying text.

136. See generally *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 390 (1985) (Burger, C.J., concurring) (asserting that when state law is ambiguous, comity and federalism do not come into play and a clear federal rule should be applied). If, instead, the Court's prior § 1738 decisions clearly barred recourse to federal preclusion law in cases in which state preclusion law was unavailing, constraints of statutory stare decisis might make it difficult for the court to adopt a more flexible view. See *infra* note 180.

137. The Chief Justice felt that "it is likely that the principles of Illinois claim preclusion law do not speak to the preclusive effect that petitioners' state court judgments should have on the present action." 470 U.S. at 390. He suggested that "in this situation, it may be consistent with § 1738 for a federal court to formulate a federal rule to resolve the matter." *Id.*

repose in preclusion law, but this may not be the strongest argument for his conclusion. It is true that certainty facilitates repose and that repose is a major goal of preclusion law.¹³⁸ Yet, it is probably also true that the certainty a clear federal governing rule promotes is offset by uncertainty that the following question generates: At what point is state law sufficiently undeveloped or unclear that reversion to federal doctrine is tolerable under section 1738? The dividing line between those cases in which state law may be said to point the way and those in which it does not will be, at best, indistinct.¹³⁹

The best justification for ultimately disregarding indeterminate state preclusion law may be that federal courts are not authoritative expositors of the meaning of state law. If state courts face a problem of uncertainty in the meaning of state law, it is cured through adjudication of the case. State courts will, in other words, add to their law whatever new meaning is necessary to explain and support their resolution of the controversy. Uncertain state law presents federal judges with far greater difficulty. They usually can neither enlist the assistance of state judges¹⁴⁰ nor decline jurisdiction because of the difficulty of state-law questions.¹⁴¹ Instead, they must "vicariously"¹⁴² create enough state law to decide the case at hand by attempting to "forecast" the state's law "as it would be expressed by its highest court."¹⁴³ The process transforms federal courts into analytically-handicapped state court surrogates, forced to speculate on the nature of governing law and unable to work significant changes on

138. See *supra* notes 32, 104.

139. *Marrese* may be close to the line. My position is that Illinois law is significant if it suggests preclusion; in his *Marrese* concurrence, Chief Justice Burger questioned the usefulness of Illinois jurisdictional competence cases in determining the preclusive effect of state court judgments on federal antitrust claims. 470 U.S. at 390.

140. "Except in those few jurisdictions permitting a federal court to certify an unsettled question of state law to the state's highest court, a federal court's decision on state law cannot be corrected, for the benefit of the litigants in the particular case, by the state's authoritative tribunal." *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 282 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). For a case in which certification was used, see *Strange v. Krebs*, 658 F.2d 268 (5th Cir. 1981).

141. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943). With a few exceptions, federal diversity courts have been required to decide cases even when state law is unsettled. See J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, 1A MOORE'S FEDERAL PRACTICE ¶ 0.309[3] (2d ed. 1985). *But cf.* *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959) (stating that the district judge correctly stayed proceedings pending interpretation of statute by Supreme Court of Louisiana).

142. The term is from 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4507, at 100.

143. *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980). This test for determining the content of state law in federal court is based on the realization that, just as the United States Supreme Court is the ultimate authority on the meaning of federal law, the ultimate authority on the meaning of state law is the state's highest court. The principle is well established. *E.g.*, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 n.3 (1983); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

Preclusion and Choice of Law

its content.¹⁴⁴ Of course, the reach of state law similarly confines federal judges in cases decided under section 1652,¹⁴⁵ but only section 1738 presents federal courts with the means to elaborate what is, in the fullest sense, a choice-of-law approach. For, although it is appropriate under either statute for a federal court to build on the implications of state law in order to honor that law,¹⁴⁶ the explicit *choice* of federal law and policy when state law is unclear is constitutionally legitimate only under section 1738.¹⁴⁷ So long as federal courts give proper respect to the clear suggestions of state law, section 1738 is capable of supporting a flexible and pragmatic approach in selecting the proper preclusion rule.

Whether Illinois law is too undeveloped to be helpful in *Marrese* is a

144. At times, when a federal decision on the meaning of state law has not been eclipsed by an intervening state decision, it has been followed by a subsequent federal court. *See, e.g.,* *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 282 (2d Cir. 1981) (explaining why the Second Circuit followed the Sixth Circuit's interpretation of Tennessee law), *cert. denied*, 456 U.S. 927 (1982). But it is clear that the courts of a state are free to disregard all federal court pronouncements—even those of the United States Supreme Court—concerning the meaning of state law. *Cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499-500 (1941) (stating that the state courts, rather than the United States Supreme Court, had “the last word on . . . [the] statutory authority” of a state agency). And the Supreme Court has acknowledged the need to look to state courts for “an authoritative construction” of state law. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 308 (1979).

145. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 21, at 710; *supra* note 132.

146. For example, federal courts must examine the decisions of lower state courts when there are no state high court decisions on point. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). If state law does not answer the preclusion question explicitly, it should usually at least provide a basis for predicting how state courts would answer the question. *See supra* note 125. The process of prediction can be interesting as well as controversial. *Compare Mason v. American Emery Wheel Works*, 241 F.2d 906, 909 (1st Cir. 1957) (holding that federal court was not obligated to apply Mississippi law in view of the Mississippi Supreme Court's indication that the law would be revised soon) *with Crutsinger v. Hess*, 408 F. Supp. 548, 554 (D. Kan. 1976) (because state law was silent on issue, federal judge applied law that he believed state court would apply if they had the opportunity to do so). In *Mason*, a federal diversity court took notice of a national trend in tort law and some inapposite Mississippi case law to predict that the Mississippi Supreme Court would repudiate its privity limitation on recovery. The prophecy was fulfilled in *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967). In *Crutsinger*, a federal court gave issue-preclusive effect to a Kansas judgment, concluding from its survey of Kansas law and national developments that, if given the opportunity, the Kansas Supreme Court would abandon its mutuality requirement. It is at least arguable that the *Crutsinger* court took excessive liberties with Kansas law. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 3, at 688 n.14 (discussing *Crutsinger*).

147. For example, Chief Justice Burger suggested that the absence of guiding Illinois state law might leave the federal court in *Marrese* free to pursue prepreclusion policies, “ensuring that their resources are used efficiently and not as a means of harassing defendants with repetitive lawsuits . . .” *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 390 (1985) (Burger, C.J., concurring). In contrast, under § 1652 federal courts do not seem authorized to apply federal law. Despite eloquent arguments to the contrary, *see Corbin, The Laws of the Several States*, 50 YALE L.J. 762, 775-77 & 777 n.17 (1941), reversion to purely federal law has not become an option in *Erie* settings, no matter how muddled or undeveloped state law might be. The greatest role federal law can play under § 1652 is as part of the data used to predict how the highest state court would decide the same case. *See McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir. 1980), *cert. denied*, 449 U.S. 976 (1980). On sources for determining state law generally, *see* Note, *supra* note 126.

matter of controversy.¹⁴⁸ Even if the federal courts conclude on remand that it is too undeveloped, it would be unfortunate if the Seventh Circuit uses as the federal standard the exaggerated preclusion rule advanced in Judge Posner's opinion. The obstacle to claim preclusion in *Marrese* arises from the relatively weak nexus between the state common law and constitutional claims presented by the petitioners in the original state proceeding and the petitioners' subsequent federal antitrust claims. Judge Posner avoided this hurdle by stressing the nexus between the federal antitrust claims and the claims under the Illinois state antitrust statute, which petitioners could have raised in their Illinois case.¹⁴⁹ This notion—that all the claims, however dissimilar, that plaintiff could have brought in the original case should be used to determine the scope of preclusion—is not new.¹⁵⁰ The reasons for rejecting it continue to have force.¹⁵¹

V. The Proper Scope of Implied Statutory Exceptions to Section 1738

A. *A Suggested Test*

If we assume that Illinois doctrine would give claim preclusive effect to *Marrese's* prior adjudication,¹⁵² is it plausible that the grant of exclusive jurisdiction over federal antitrust claims functions as an implied exception to section 1738?

There is a certain symmetry to the implied-exception argument. It is hard to see much difference between depriving federal courts of the opportunity to adjudicate federal antitrust claims because they have al-

148. See *supra* text accompanying note 76, and notes 127, 137 and accompanying text.

149. See *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1154-55 (7th Cir. 1984).

150. See, e.g., F. JAMES, *supra* note 38, at 555 n.13 (citing authorities).

151. "Where . . . claims are factually quite distinct so that there will be no overlap in presenting evidence to support them, much less is to be saved by trying them together, or including them in a single lawsuit to be tried separately. Indeed, trying them together may cause confusion and prejudice." *Id.* at 555. Professor James also suggests that fear of claim waiver generated by the rule might force parties to introduce claims that would not otherwise have been litigated. *Id.* And, he notes that consequences from the omission of insufficiently related claims would be too severe: "Hardship from oversight would be greatly multiplied if the parties were bound to think of all the aspects of all possible claims against their adversaries." *Id.* at 556. For further criticisms of this approach, see 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4412, at 93-106; Cleary, *supra* note 9, at 347. *But cf.* Berch, *supra* note 16, at 533 (arguing that absentees similarly situated to claimants should be precluded by adjudications in which they had an opportunity to participate by intervention); Note, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551, 1565 (1979) (same).

152. The question is discussed *supra* notes 128, 137. The Supreme Court directed an examination of Illinois law on remand. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985). See *supra* text accompanying note 76.

Preclusion and Choice of Law

ready been adjudicated in state court, and depriving federal courts of the same opportunity because the federal antitrust claim—although not raised in the prior state proceeding—is sufficiently related to a state claim that was, or could have been, raised in the earlier state action such that it now should be precluded. Exclusive federal jurisdiction addresses the first situation by confining federal antitrust claims to federal court. A consistent approach would prevent state judgments from precluding claims that exclusive federal antitrust jurisdiction would not permit them to adjudicate.

Perhaps the chief difficulty with this argument is that Congress could have required consistent results but has failed to do so. Both section 1738 and federal antitrust statutes are silent concerning the possible claim preclusive effects of state judgments on subsequent federal antitrust cases. The Supreme Court has noted that its power to suspend section 1738's requirement that state judgments be enforced must derive from statutory interpretation.¹⁵³ The Court has evinced an understandable reluctance to partially repeal section 1738 under the guise of statutory interpretation,¹⁵⁴ therefore the test to be met for implying an exception to section 1738 must be exacting.

In light of the Court's attitude, more than a demonstration that suspension of section 1738 would complement the purposes of exclusive federal antitrust jurisdiction should be required to establish an implied exception to section 1738. The Supreme Court should expressly declare what it has intimated:¹⁵⁵ An implied exception should be found in cases like *Marrese* only if preclusion by state judgment would so frustrate the purposes served by exclusive federal antitrust jurisdiction as to make the suspension of section 1738 implicit in the creation of exclusive federal jurisdiction. The appropriate measure for such a test is the difference between the effective operation of exclusive antitrust jurisdiction with and without suspension of section 1738.

B. *Resolving the Implied-Exception Issue in Marrese*

From the vantage provided in *Marrese*, it does not appear that a

153. "[A]n exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982).

154. In *Kremer*, the Court noted: "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." 456 U.S. at 468 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). The Supreme Court reiterated the point in its post-*Marrese* decision, *Parsons Steel, Inc. v. First Ala. Bank*, 106 S. Ct. 768, 772 (1986), when it refused to use the "relitigation" exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), to imply an exception to § 1738.

155. See *supra* notes 90, 153-54.

refusal to suspend section 1738 would so harm the effective operation of exclusive federal antitrust jurisdiction as to justify implying an exception to the statute. This is so because the benefits of exclusive federal antitrust jurisdiction have so diminished that in most cases it scarcely matters whether exclusive federal jurisdiction is insulated from the preclusive effects of state judgments.¹⁵⁶

Much of the discrete significance that federal antitrust law had when the Supreme Court determined federal jurisdiction to be exclusive over sixty years ago¹⁵⁷ is now gone. Intervening years have seen the proliferation of state antitrust statutes.¹⁵⁸ Some state statutes are so similar to federal law that federal antitrust decisions are used to interpret them.¹⁵⁹ In other instances, state courts have read their statutes to provide opportunities for antitrust recovery unavailable under federal law.¹⁶⁰ A recent study suggests that antitrust claimants are exhibiting a growing preference for state courts.¹⁶¹

The object of exclusive antitrust jurisdiction was, as with any grant of exclusive federal jurisdiction, to enhance enforcement of federal law.

This purpose is accomplished by providing for uniform interpretation and application of federal laws, preventing state court bias and misapplication of those laws, assuring that federal judges can utilize their expertise in adjudicating federal claims, and allowing for jury trial and the use of extensive federal discovery and evidence rules.¹⁶²

To the extent that federal antitrust law continues to stand apart from state law, however, the protections offered by exclusive federal jurisdiction are to a large extent both ineffectual and unnecessary.

To begin with, exclusive federal jurisdiction does not direct all federal antitrust questions to federal courts. State courts can and do adjudicate federal antitrust defenses raised in response to state claims.¹⁶³ Two

156. See *infra* note 182 (noting special circumstances, not suggested in *Marrese*, when an exception to § 1738 might be implied).

157. See *supra* note 80.

158. About forty states had enacted their own antitrust laws by 1963. Hanson & von Kalinowski, *The Status of State Antitrust Laws with Federal Analysis*, 15 W. RESERVE L. REV. 9, 9-10 (1963).

159. *Id.* at 13; Hovenkamp, *State Antitrust in the Federal System*, 58 IND. L.J. 375, 377 n.10 (1983).

160. Hovenkamp, *supra* note 159, at 377 n.10.

161. *Id.* at 378.

162. Note, *Estoppel—Exclusive Jurisdiction*, *supra* note 81, at 1282. For additional surveys of the intended effects of exclusive federal jurisdiction, see M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 112-13 (1980); Note, *Judicial Abstention and Exclusive Federal Jurisdiction: A Reconciliation*, 67 CORNELL L. REV. 219, 232 (1981) [hereinafter cited as Note, *Judicial Abstention*].

163. See Comment, *State Judgments—Federal Antitrust*, *supra* note 81, at 955; Note, *Estoppel—Exclusive Jurisdiction*, *supra* note 81, at 1285-86; Comment, *Exclusive Jurisdiction: The Effects of State Court Findings*, 8 STAN. L. REV. 439, 447 (1956).

Preclusion and Choice of Law

factors explain this. First, limitations on federal subject matter jurisdiction prohibit filing a case in federal court or removing a state case to federal court solely because of the existence of an affirmative defense based on federal law.¹⁶⁴ Second, not only *may* a state court entertain federal question affirmative defenses, but, under the supremacy clause of the United States Constitution, the state court *must* do so before deciding against the party raising the defense.¹⁶⁵ This means that only federal antitrust *claims* can be thought of as within the exclusive preserve of the federal courts.¹⁶⁶

Even if parties litigated all federal antitrust questions in federal court, it is unlikely that anything approaching genuine uniformity of interpretation could be achieved. Although one cannot doubt the function of the Supreme Court in elaborating uniform federal law,¹⁶⁷ the Court "is no longer capable of providing the supervision of federal judicial law-making that it once provided."¹⁶⁸ The lack of effective Supreme Court

164. See, e.g., *Louisville & N.R.R. v. Mottley*, 211 U.S. 149, 152 (1908); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894). *Mottley* held that a federal question issue that is not necessary to a well pleaded complaint but only appears in the answer as an affirmative defense is outside the scope of the general federal question statute—now 28 U.S.C. § 1331 (1982). The same limitation has been imposed on the alternative federal question basis for antitrust suits—28 U.S.C. § 1337 (1982). See *Peyton v. Railway Express Agency, Inc.*, 316 U.S. 350, 353 (1942) (citing, *inter alia*, *Mottley*). The *Planter's Bank* case held that a case filed in state court is not removable to federal court if the only federal issue appears in the answer to the complaint. See 152 U.S. at 460. The result of these rulings, ironically, is to confer a kind of exclusive jurisdiction on state courts in cases raising a federal question only as an affirmative defense. An American Law Institute recommendation would provide a general remedy to this situation by broadening federal statutory removal of controversies exceeding \$10,000 to reach cases involving a federal issue even if raised only in an affirmative defense. See ALI STUDY, *supra* note 80, at 195 (proposed § 1312(a)(2)). Broadened statutory removal also has been advocated with particular reference to state-court affirmative defenses addressing the subject matter of federal exclusive jurisdiction. See Note, *Estoppel—Exclusive Jurisdiction*, *supra* note 81, at 1305-06; cf. Dickinson, *Exclusive Federal Jurisdiction and the Role of the States in Securities Regulation*, 65 IOWA L. REV. 1201, 1245-47 (1980) (advocating a similar proposal for state-court defenses based on the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78lll (1982), which provides for exclusive federal jurisdiction).

165. M. REDISH, *supra* note 162, at 124; Note, *Estoppel—Exclusive Jurisdiction*, *supra* note 81, at 1303.

166. It is not even settled that all *claims* are within the exclusive preserve of federal antitrust jurisdiction. State decisions are divided over whether state courts have the authority to entertain federal antitrust counterclaims. Compare *Pennsylvania-Dixie Cement Corp. v. H. Wales Lines Co.*, 119 Conn. 603, 178 A. 659 (1935) (dismissing federal antitrust counterclaims) and *Reed Enters., Inc. v. Books, Inc.*, 110 R.I. 179, 291 A.2d 261 (1972) (holding that defendant's counterclaim for damages under the Clayton Act is not subject matter over which the state court has jurisdiction) with *City Trade & Indus., Ltd. v. New Cent. Jute Mills Co.*, 25 N.Y.2d 49, 250 N.E.2d 52, 302 N.Y.S.2d 557 (1969) (permitting state-court adjudication of federal antitrust counterclaims) and *State ex rel. W. Va. Truck Stop, Inc. v. Belcher*, 156 W. Va. 183, 192 S.E.2d 229 (1972) (upholding state-court adjudication of compulsory counterclaim alleging violation of federal antitrust laws).

167. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 210-11 (1976); Betten, *Institutional Reform in the Federal Courts*, 52 IND. L.J. 63, 68 (1976).

168. Carrington, *supra* note 21, at 553. The Supreme Court has traditionally kept abreast of its workload. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 43 (5th ed. 1978). Increasingly, however, this is possible only by truncating the process of decision in some cases and evading deci-

superintendence¹⁶⁹ has placed federal courts of appeal in a position “to create and to balkanize national law.”¹⁷⁰ Appellate courts have created considerable confusion and some conflict over the meaning of federal law at both intracircuit and intercircuit levels.¹⁷¹

Moreover, in the antitrust setting, the need for the other “advantages” of exclusive federal jurisdiction is questionable. The possibility that judges might be biased against or misunderstand federal law—always difficult to establish¹⁷²—seems particularly unlikely because anti-trust causes of action have become a familiar part of state law.¹⁷³ The significance of the federal courts’ antitrust expertise has diminished for the same reason. Jury trials (a mixed blessing in antitrust cases¹⁷⁴) may be more available in federal court,¹⁷⁵ but plaintiffs’ increasing partiality

sion in others. *See generally* Griswold, *Rationing Justice—The Supreme Court’s Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975) (highlighting the problem of “rationed justice” that necessarily arises in keeping the Court from being overworked).

169. According to a prominent study:

Supreme Court review has become an exceedingly unlikely event in most federal litigation. Of about 8,000 cases decided after hearing and submission in the courts of appeals, only about one in a 100 will be given full consideration by the Supreme Court. Of the cases tried in the district courts, about one in 300 reaches the Supreme Court.

P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 167, at 209.

170. Betten, *supra* note 167, at 68.

171. The primary means of resolving intracircuit conflict has been en banc rehearing before the entire circuit. It has been suggested that “the en banc device is foundering.” P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 167, at 201. The tortured Seventh Circuit history of *Marrese* offers some confirmation. *See supra* text preceding note 67.

Differing approaches at the intercircuit level undoubtedly lead to some conflicts and may be at least problematic in causing extended confusion before conflicts coalesce. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 167, at 212-13.

Finally, consider Professor Bator’s assessment of the argument that federal court adjudications enhance uniformity of federal constitutional law:

There is no reason to think that the federal district courts will achieve more uniform results with respect to questions of federal constitutional law than the supreme courts of the fifty states. Review by the courts of appeals does, of course, create some centripetal force. But it is notorious that, with twelve [now 13] circuits and increasing numbers of judges on them, the prospects of inter- and intracircuit conflicts are substantial and increasing.

Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 636 n.68 (1981).

172. Even commentators who argue that federal courts provide better federal law adjudications than state courts concede that their position is difficult to document. M. REDISH, *supra* note 162, at 3; Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 726 (1981).

173. *See supra* notes 158-61 and accompanying text.

174. Antitrust suits can provide the kind of complex litigation capable of overwhelming juries. Current problems have generated an interesting debate over the right to trial by jury. *Compare* Lempert, *Civil Juries and Complex Cases: Let’s Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981) (discussing the difficulties in limiting jury trials) with Luneberg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887 (1981) (discussing alternatives to jury trials in complex litigation).

175. “State law may deny a jury trial in a case where the Seventh Amendment requires a jury trial” in federal court. C. WRIGHT, *THE LAW OF FEDERAL COURTS* 606-07 (4th ed. 1983).

Preclusion and Choice of Law

for state antitrust forums¹⁷⁶ suggests that the lack of a state jury trial is not important, at least to them. Finally, whatever special advantages litigants in federal court derive from the federal rules of civil procedure and evidence have diminished as an increasing number of states have adopted those rules for use in their courts.¹⁷⁷

Developments since the Supreme Court ruled federal antitrust jurisdiction to be exclusive¹⁷⁸ have, in short, greatly lessened both the need for and the advantages of exclusive jurisdiction in the enforcement of federal antitrust law.¹⁷⁹ It is unlikely that the Court will overrule its decisions requiring exclusive federal jurisdiction over federal antitrust claims.¹⁸⁰ Nonetheless, because the purposes served by exclusive anti-

176. See *supra* note 161 and accompanying text.

177. By 1984, 29 states had adopted the Federal Rules of Evidence in various forms. J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE, RULES AND STATUTE SUPPLEMENT T-1* (1985). About the same number of states have also adopted the Federal Rules of Civil Procedure. Cf. Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 NW. U.L. REV. 894, 897 n.14 (1980) (surveying states using Federal Rule of Civil Procedure 24).

178. *General Inv. Co. v. Lake Shore & M. S. Ry.*, 260 U.S. 261, 287 (1922); *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440-41 (1920).

179. As early as 1957, an observer wrote:

Several considerations relating to the antitrust law and to the Securities Exchange Act of 1934 indicate instances in which exclusive jurisdiction may be inappropriate. That uniformity is not a significant factor in these fields is indicated by the coexistence of parallel state and federal statutes. Similarly, the disparity of experience between the two systems is diminished, since state and federal courts are adjudicating closely related claims.

Note, *Exclusive Jurisdiction—Private Actions*, *supra* note 81, at 515. But see Comment, *State Judgments—Federal Antitrust*, *supra* note 81, at 965 (stressing “the particularly complex character of antitrust litigation and the greater expertise of federal judges in this area”).

180. It often seems that the Court will give greater stare decisis effect to its settled interpretations of statutes than it will either to its constitutional decisions or its diminishing number of common law precedents. This hierarchical view of stare decisis is not universally accepted, see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 148 (1921), but it is defensible. Congress is presumed to acquiesce in the judicial interpretations of its statutes when it does not overrule them by statutory amendment. This can be seen as a kind of retrospective legislative intent. Moreover, if the Court were more willing to reinterpret statutes, this might sap Congress' initiative to review and periodically revise statutory law. Therefore, “once a decisive interpretation of legislative intent has been made, and in that sense a direction has been fixed within the gap of ambiguity, the court should take that direction as given.” E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 23 (1948). For examples of the force of stare decisis given to the Court's interpretation of federal jurisdictional statutes, see *Snyder v. Harris*, 394 U.S. 332 (1969) (adhering to precedents barring the aggregation of separate claims to satisfy the jurisdictional-amount requirement for diversity jurisdiction, notwithstanding the suggestion that provision for broadened federal class actions under revised Federal Rule of Civil Procedure 23 should be read to permit aggregation); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) (adhering to precedents requiring a federal issue to arise within plaintiff's well-pleaded complaint, notwithstanding the suggestion that the Declaratory Judgment Act 28 U.S.C. § 2201 (1982), authorized plaintiff to anticipate federal issues defendant might raise in a suit for coercive relief). But see *Boys Mkts., Inc. v. Retail Clerks' Union*, Local 770, 398 U.S. 235 (1970). In that case, the Court overruled a prior interpretation of the Norris-LaGuardia Act, and concluded that a lower federal court had jurisdiction to enjoin a violation of a no-strike clause in a collective bargaining contract. Dissenting, Justice Black wrote: “When the law has been settled by an earlier case then any subsequent ‘reinterpretation’ of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute.” 398 U.S. at 257-58.

trust jurisdiction are on the wane, it would be particularly inappropriate for the Court now to imply an exception to section 1738 based on federal antitrust jurisdiction.¹⁸¹ In any event, the Court could not substantially recreate the benefits of exclusive federal antitrust jurisdiction by suspending the full faith and credit statute.¹⁸²

C. *Implied-Exception Issues in Other Cases*

It is tempting to go further and suggest that rarely should exclusive federal jurisdiction justify an implied exception to section 1738, but admonitions to proceed carefully¹⁸³ probably are warranted. The strength of the implied-exception argument will vary from one type of exclusive jurisdiction to another.¹⁸⁴ And, although the foregoing analysis suggests that exclusive antitrust jurisdiction generally does not justify an implied exception to section 1738, an exception probably should be found to prevent state court determinations of fact from precluding a defense against

181. This is at least true in cases, like *Marrese*, in which the question is not whether state-court determinations of fact preclude the federal defendant from resisting a subsequent federal-court claim for treble damages under 15 U.S.C. § 15 (1982). When a federal treble damages claim is at issue, it is arguable that to give preclusive effect to the state proceeding might exaggerate its importance and that, because two-thirds of such an award is bottomed on penal policies of federal law (making plaintiffs, in essence, private federal prosecutors), a stronger case can be made for full adjudication in federal court. At the same time, it seems unwarranted for federal courts to go further and imply an exception to § 1738 to permit federal *claimants* to relitigate facts underlying their treble-damage claims.

182. Assuming it would be desirable for federal antitrust law to pose uniform standards and for determination of those standards to be entrusted only to federal judges, congressional initiatives will be necessary to make it possible.

State-court adjudication of federal antitrust defenses, *see supra* note 164 and accompanying text, would be unaffected by implying an exception to § 1738. Congress would have to amend the Judicial Code so that cases in which federal antitrust questions arise only as affirmative defenses can be filed in or removed to federal court. *See supra* notes 162-64 and accompanying text.

And it would take further congressional action to achieve substantive uniformity by changing the present nonpreemptive posture of federal antitrust law. "Most real cases are adequately covered by the general rule that state antitrust law may be enforced even though it prohibits less, the same, or more than federal antitrust law." 1 P. AREEDA & D. TURNER, *ANTITRUST LAW—AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 208, at 5 (1978). Inasmuch as federal antitrust law has been interpreted to leave state antitrust law free to provide broader remedies or causes of action, *see Hovenkamp, supra* note 159, at 377 n.10, 389-90, states remain free to devise rival approaches in determining the measure of accountability for anticompetitive practices.

183. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4470, at 689 (noting "intimate knowledge of each grant of exclusive jurisdiction and the related substantive law" to be a prerequisite to determining whether an implied exception should be found); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 86 comment d (1982) ("Whether a scheme of federal remedies implies an exception to 28 U.S.C. § 1738 . . . is a matter of statutory interpretation. However, the intention of Congress to make such an exception should not be readily inferred."); *supra* note 90 and accompanying text (discussing *Marrese*, *Brown*, and *Kremer* and their explanations of when courts have found exceptions to § 1738 acceptable).

184. Presumably, the more important it is for a type of adjudication to be in federal court, the stronger becomes the basis for arguing an exception to § 1738. Thus, the Supreme Court seems to have read federal bankruptcy jurisdiction to create an exception. *See supra* note 90 and its discussion of *Brown v. Felsen*, 442 U.S. 127 (1979).

Preclusion and Choice of Law

a subsequent treble-damage claim in federal court.¹⁸⁵ Perhaps the most that can be said is that there should be a presumption against implying an exception to section 1738 from exclusive federal jurisdiction¹⁸⁶ in order to guard against judicial overreaching,¹⁸⁷ reinforce the finality of state judgments,¹⁸⁸ and promote harmony between state and federal courts.¹⁸⁹

The answer to the question whether the exercise of the federal court's *concurrent* jurisdiction justifies exceptions to section 1738 is more simple. Such exceptions will seldom, if ever, be warranted.

The justification for giving state adjudications preclusive effect under section 1738 is most clear when a plaintiff's federal claim would have been within the concurrent jurisdiction of a state court, but plaintiff failed to present it when suing there. There is little doubt that if the nexus between the adjudicated state claim and the omitted federal claim is sufficient to satisfy the requirements of claim preclusion, a subsequent federal court should preclude the federal claim.¹⁹⁰

The analysis is more difficult when the party to be precluded did not choose the state forum.¹⁹¹ In *Allen v. McCurry*,¹⁹² a section 1983¹⁹³ case, however, the Supreme Court refused to attach significance to this difference. The Court gave issue-preclusive effect to a prior state criminal

185. See *supra* note 181.

186. Thus I would attach far less importance to the subsequent exercise of exclusive federal jurisdiction than did the ALI in its RESTATEMENT (SECOND) OF JUDGMENTS. See *supra* note 81 (federal antitrust claims would not be barred by judgment in state court under state antitrust laws).

187. See *supra* notes 153-56 and accompanying text.

188. See *supra* note 104 and accompanying text.

189. "[W]henver a state court judgment is refused an effect with which it would otherwise be endowed, some stress is imposed on the relations of mutual respect that properly characterize the federal legal system." RESTATEMENT (SECOND) OF JUDGMENTS § 86 comment d (1982). The Supreme Court has recognized that notions of comity and federalism support federal court recognition of state judgments. See *supra* note 117 and accompanying text.

190. Noting the possibility of sufficiently related state and federal claims, the *Restatement (Second) of Judgments* states:

When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.

RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment e (1982); see also *id.* § 86 comment f ("[F]ailure to assert an alternative federal basis for a claim that could rest on both federal and state law generally results in claim preclusion."). For a general discussion of requirements of claim preclusion, see *supra* notes 8-13 and accompanying text.

191. Several writers give this factor considerable weight. See Smith, *supra* note 50, at 112; *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1342 (1977) [hereinafter cited as *Developments*]; Comment, *Res Judicata and Section 1983: The Effect of State-Court Judgments on Federal Civil Rights Actions*, 27 UCLA L. REV. 177, 200 (1979).

192. 449 U.S. 90 (1980).

193. Congress enacted § 1983 as part of the Civil Rights Act of 1871, 17 Stat. 13 (current version at 42 U.S.C. §§ 1983-86 (1982); 28 U.S.C. § 1343 (1982)).

court determination that the rights of the federal court plaintiff had not been violated.

Despite numerous suggestions to the contrary,¹⁹⁴ the Supreme Court was correct in refusing to imply an exception to section 1738 based upon section 1983.¹⁹⁵ Federal courts should be as free under section 1738 to give preclusive effect to issues decided in state criminal proceedings as they would be to give preclusive effect to issues decided in federal criminal adjudications.¹⁹⁶ Section 1983 does not suggest that Congress intended to assure a federal-court setting for section 1983 litigation¹⁹⁷ or that Congress intended to guarantee civil rights litigants the opportunity to litigate all their issues from an affirmative posture.¹⁹⁸ Furthermore,

194. See, e.g., Smith, *supra* note 50, at 63 n.22 (citing extensive list of commentaries).

195. The Court stated in *Allen*:

[N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights.

449 U.S. at 103-04.

For a while it appeared that an exception might be available, depending on how broadly the Court was willing to read its "full and fair opportunity" prerequisite. See Resnik, *supra* note 18, at 972. However, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982)—although a Title VII case—served to confine the avenue of escape in § 1983 proceedings to Constitution-based collateral attack, holding that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed" by § 1738. *Id.* at 481. In *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), the Court rejected in more categorical terms the argument that § 1983 supports an exception to § 1738 and extended its issue-preclusion holding in *Allen*, 449 U.S. 90, to the field of claim preclusion. See *Migra*, 465 U.S. at 83.

196. Federal courts have given preclusive effect in civil rights cases to prior federal criminal proceedings. See *Doherty v. United States*, 500 F.2d 540, 547 (Ct. Cl. 1974); *Smallwood v. United States*, 358 F. Supp. 398, 409 (E.D. Mo. 1973). Preclusion can operate regardless of whether the precluded party is plaintiff or defendant in a subsequent civil action:

[I]t is beyond question that a prior criminal proceeding can have a collateral estoppel [issue preclusive] effect in the subsequent civil action. This general rule is not changed by the fact that the action is brought by the person convicted in the prior criminal action instead of the usual case where the government brings civil action to recover damages subsequent to the criminal conviction.

Willard v. United States, 422 F.2d 810, 811 (5th Cir. 1970) (citations omitted). The issue-preclusive effect of criminal convictions in favor of third parties is generally recognized in RESTATEMENT (SECOND) OF JUDGMENTS § 85(2)(a) (1982).

The preclusive effect of the state criminal judgment on federal § 1983 proceedings should be first examined with reference to state law. See *supra* notes 114-16 and accompanying text. If state law supports the conclusion that the judgment is preclusive, § 1738 requires that it be given preclusive effect. A decision to preclude could be based on federal doctrine if state law on the point is confused or undeveloped, see *supra* note 147 and accompanying text, or if the federal court is warranted in augmenting the preclusive effect of the state judgment, see *infra* text accompanying notes 234-40, 250.

197. But see Smith, *supra* note 50, at 61-62 (suggesting that legislative intent behind § 1983 may support case-by-case exceptions to state rules of preclusion).

198. One critic has argued that federal suits under § 1983 should "be unfettered by prior state court determinations where the federal plaintiff did not freely elect to litigate in state courts." This, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859, 873 (1976). For statements in a similar vein, see *Developments, supra* note 191, at 1342; Comment, *supra*

Preclusion and Choice of Law

because federal court jurisdiction in section 1983 cases is only concurrent,¹⁹⁹ it is impossible to argue—as one might attempt to argue if the jurisdiction were exclusive²⁰⁰—that suspension of section 1738 must be implied in order to realize the purposes of federal jurisdiction.²⁰¹ Although the legislative history of section 1983 includes evidence of concern over civil rights enforcement in state courts, this provides an inadequate basis for implying the suspension of section 1738.²⁰² As Professor Currie noted, “All grants of federal jurisdiction are based upon some perceived inadequacy of state courts.”²⁰³

The Court’s position in *Allen* seems defensible for another reason. In a line of cases beginning with *Younger v. Harris*,²⁰⁴ the Supreme Court sharply reduced the availability of federal injunctive or declaratory relief under section 1983 against state law-enforcement officials. The purpose of the *Younger* doctrine is to remit federal civil rights claimants to pending state judicial proceedings.²⁰⁵ Whatever misgivings one might have

note 191, at 200. As the Supreme Court declared in *Allen v. McCurry*, 449 U.S. 90, 97 (1980), however, there is no suggestion from § 1983 that such an effect is intended. In Professor Currie’s words, “No language in section 1983 remotely suggests any modification of *res judicata*.” Currie, *supra* note 79, at 328.

199. Federal jurisdiction to entertain § 1983 actions exists under 28 U.S.C. §§ 1331, 1343 (1982). The United States Supreme Court has yet to determine whether or under what circumstances state courts are obliged to entertain § 1983 actions. *See, e.g.*, *Spencer v. South Carolina Tax Comm’n*, 105 S. Ct. 1859, 1859 (1985) (*per curiam*) (affirming by an equally divided vote and without opinion the refusal of South Carolina courts to entertain a § 1983 claim). It is clear, however, that state courts are competent to adjudicate § 1983 claims and they have usually been willing to do so. *See Maine v. Thiboutot*, 448 U.S. 1 (1980) (affirming state court adjudication of § 1983 claim).

200. Current law suggests that an exception to § 1738 should be implied if preclusion by state judgment would so frustrate the purposes served by exclusive federal jurisdiction as to make suspension of § 1738 implicit in the jurisdictional grant. *See supra* note 154 and text following note 153.

201. *Cf. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, supra* note 21, at 244 (Supp. 1981) (“When Congress ‘assures’ a litigant a federal forum for the vindication of certain rights, should that be taken as a decision to *deprive* state courts of normal competence finally to adjudicate federal questions properly before them in cases over which they have jurisdiction?”) (emphasis in original).

202. As the Court observed in *Allen v. McCurry*:

[T]he debates show that one strong motive behind [§ 1983’s] enactment was grave congressional concern that the state courts had been deficient in protecting federal rights. But in the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and *res judicata*. Since repeals by implication are disfavored, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.

449 U.S. at 98-99 (citations omitted).

203. Currie, *supra* note 79, at 328.

204. 401 U.S. 37 (1971).

205. In *Younger*, the Court struck down a federal injunction against a pending state criminal prosecution alleged to be in violation of the federal plaintiff’s first amendment rights. The decision was based in part on considerations of equitable discretion—“the basic doctrine of equity jurisprudence that courts of equity should not act . . . to restrain a criminal prosecution, when the moving party has [through assertion of his rights as a state criminal defendant] an adequate remedy at law

over the wisdom or necessity of the *Younger* doctrine, the deference to state proceedings that it requires would be illusory if resulting state judgments were denied preclusive effect in federal court. This is why arguments to imply an exception to section 1738 based on section 1983 frequently seem to be an attempt to refight the battle against the *Younger* doctrine.²⁰⁶ If the *Younger* doctrine is wrong, it should be addressed on its own terms.²⁰⁷ Unless or until it is, *Allen* must be followed.

Recently, the Supreme Court extended its holding in *Allen* to reach claim as well as issue preclusion. In *Migra v. Warren City School District Board of Education*,²⁰⁸ plaintiff school administrator sued her employers in Ohio state court for wrongful discharge. She later brought a section 1983 suit against the same defendants in federal court. Noting that she had failed to present her section 1983 claim in the prior state adjudication,²⁰⁹ the Supreme Court held that she was subject to any claim preclusion existing under Ohio state law.²¹⁰ In so doing, the Court again rejected the argument that section 1983 operated as an exception to section 1738.²¹¹ The Court noted that plaintiff's argument for an exception was the same as had been put forth in *Allen*: "[T]hat state-court judgments should have less preclusive effect in § 1983 suits than in other federal suits" because of "Congress' expressed concern over the adequacy

and will not suffer irreparable injury if denied equitable relief." 401 U.S. at 43-44. The Court also noted concerns of comity and federalism. *Id.* at 44. In a series of cases beginning with *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the Court has used the *Younger* doctrine to bar § 1983 injunctions against pending state civil proceedings. And, the Court has invoked *Younger* to bar the issuance of federal declaratory judgments in cases in which issuance of injunctions would not be permitted. See *Samuels v. Mackell*, 401 U.S. 66 (1971).

206. Compare *Smith*, *supra* note 50, at 61-62 (arguing that policy and precedent support flexible application of full faith and credit principles in § 1983 litigation) and *Theis*, *supra* note 198, at 873 (arguing that the history and purpose of § 1983 require an exception to § 1738) with *Juidice v. Vail*, 430 U.S. 327, 342-47 (1977) (Brennan & Marshall, JJ., dissenting) (claiming that to deny the § 1983 plaintiff access to federal courts because of pending state civil proceedings is contrary to the purposes of the § 1983 remedy) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 616-18 (1975) (Brennan, Douglas & Marshall, JJ., dissenting) (arguing that in *Younger* doctrine cases the history and purpose of § 1983 require initial access to federal courts).

207. It is my view, and that of many other commentators, that the *Younger* doctrine is wrong. Perhaps the most basic problem with *Younger* is that it usurps Congress' prerogative to allocate judicial business between the state and federal courts. See *Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71, 88 (1984); *Shreve, Federal Injunctions and the Public Interest*, 51 *GEO. WASH. L. REV.* 382, 413-19 (1983). For a thoughtful critique of other frailties of the *Younger* doctrine, see *Zeigler, Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine from a Modern Perspective*, 19 *U.C.D. L. REV.* 31 (1985).

208. 465 U.S. 75 (1984).

209. *Id.* at 83. On the availability of § 1983 adjudications in state court, see *supra* note 199.

210. 465 U.S. at 85. Using the technique it was to repeat in *Marrese*, the Supreme Court remanded the case for a more searching examination of state preclusion law. It appeared, however, that *Migra's* claim could be precluded under Ohio law. See *Rush v. City of Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599 (1958), *cert. denied*, 358 U.S. 814 (1958).

211. 465 U.S. at 84.

Preclusion and Choice of Law

of state courts as protectors of federal rights.”²¹² Reiterating the view it had expressed in *Allen* concerning the relationship between sections 1983 and 1738, the Court stated: “It is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments.”²¹³

The Court seems to have reached the correct decision in *Migra*. Plaintiff *Migra* weakened her position when she opted to begin by litigating in state court. Her failure to present a sufficiently related federal claim, also within the state court’s jurisdiction, would be lethal under conventional wisdom.²¹⁴ Under such circumstances, it would be impossible to deny preclusive effect to the Ohio judgment without questioning the underlying authority of *Allen*.²¹⁵

When the Supreme Court correctly concluded in *Allen* that an exception to section 1738 could not be implied from section 1983,²¹⁶ it greatly undercut its earlier decision in *England v. Louisiana State Board of Medical Examiners*.²¹⁷ The Court had held in *England* that a federal-court claimant, required by the *Pullman* abstention doctrine²¹⁸ to present his state-law issues in state court, could thereafter reintroduce his federal

212. *Id.* at 83-84.

213. *Id.* at 83; *cf.* *McDonald v. City of West Branch*, 466 U.S. 284, 289-90 (1984) (equating claim and issue preclusion and refusing to give preclusive effect under § 1738 to a state arbitration award). On the tendency of the Supreme Court not to distinguish between claim and issue preclusion in § 1738 cases, see *supra* note 115.

214. This is the view taken in the RESTATEMENT (SECOND) OF JUDGMENTS. See *supra* note 190. The American Law Institute hedged with reference to § 1983 cases, however, describing them as “[p]articularly difficult and controversial.” RESTATEMENT (SECOND) OF JUDGMENTS § 86 comment d (1982).

215. *But see* Note, *Claim Preclusion and Section 1983 Civil Rights Actions: Migra v. Warren City School Board of Education*, 70 IOWA L. REV. 287, 292 (1984) (attempting to distinguish *Migra* from *Allen* and arguing that *Migra* was wrongly decided).

216. See *supra* note 195 and accompanying text.

217. 375 U.S. 411 (1964).

218. The doctrine takes its name from *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941). It applies when, first, the need to invalidate a state statute or regulation as unconstitutional can be avoided if state law is given a certain meaning and, second, that meaning is not evident enough for a federal court to feel comfortable in declaring it, but is within the greater interpretive power of a state court. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 232 (1948) (noting the difficulties “inhering in the fact that federal courts are not the authorized expositors of state law”); see also *supra* notes 140-44 and accompanying text (discussing the difficulties facing federal judges in resolving questions of unsettled state law).

Under the *Pullman* doctrine, a variety of different consequences from state adjudications may serve to avoid the necessity of federal constitutional adjudication. The state-law issue might be whether the challenged state statute can be interpreted so as to avoid constitutional problems, *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289 (1979), whether the challenged statute might not also violate the state constitution, *Reetz v. Bozanich*, 397 U.S. 82 (1970), or whether the case might otherwise be disposed of on state-law grounds. *Pullman*, 312 U.S. 496.

Rules governing abstention are more difficult to determine when a federal constitutional question is not raised. Compare *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1950) (requiring abstention) with *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943) (refusing abstention).

issues in federal court.²¹⁹ Although not in so many words,²²⁰ *England* operated to suspend section 1738 by insulating any subsequent federal-law adjudication in federal court from the claim- or issue-preclusive effects of the state judgment.

The *England* decision is simply wrong. It is probably true that the dispensation *England* grants from section 1738 is necessary for the *Pullman* doctrine to work as intended.²²¹ But, even if preservation of the *Pullman* doctrine is desirable,²²² it cannot be accomplished through illicit suspension of section 1738.²²³ Absent an exception to section 1738, the statute clearly requires state judgments to be given as much preclusive effect in federal court as they would have received where rendered. Because no statutory exception exists for *England*-type cases, the Supreme Court is in the indefensible position of creating an exception as a matter of judicial doctrine.²²⁴

219. He could do so if the adjudication of the state issues did not moot the case and if he informed "the state courts that he [was] exposing his federal claims" there to assist the state courts in evaluating the state issues and "that he intends, should the state courts hold against him on the question of state law, to return to the district court for disposition of his federal contentions." *England*, 375 U.S. at 421.

220. Curiously, the Court makes no reference to § 1738 in *England*.

221. Although the *Younger* doctrine requires dismissal of the federal case, see *supra* note 205, invocation of the *Pullman* doctrine is more appropriately accompanied by a stay of the proceedings. The Supreme Court has encouraged federal courts to retain jurisdiction. *E.g.*, *Harris County Comm'r's Court v. Moore*, 420 U.S. 77, 88 n.14 (1975); *Zwickler v. Koota*, 389 U.S. 241, 244 n.4 (1967). If the purpose for adjudicating the federal case does not disappear during the interim, see *supra* note 218, the federal court is expected to conclude the litigation. *Pullman* abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise . . ." *Harrison v. NAACP*, 360 U.S. 167, 177 (1959).

It has never been suggested that the reasons supporting the *Pullman* doctrine are sufficient to justify forfeiture of plaintiff's opportunity to seek a federal court determination of federal law. Yet this is the effect *Pullman* abstention could have without the protections of *England*. If the state case came to final judgment first and was permitted full effect, it could prevent by claim or issue preclusion the subsequent federal court adjudication of plaintiff's federal issues. Without *England*, *Pullman* abstention could function as an "abdication of federal jurisdiction." *Harrison*, 360 U.S. at 177. Putting the matter somewhat differently, Professor Currie observed, "To reduce the violence abstention does to section 1331 [general federal question jurisdiction], *England* ignores section 1738." Currie, *supra* note 79, at 331.

222. The *Pullman* doctrine has received a generally unfavorable critical reception. Commentators have pointed to the egregious delays that federal court claimants have been subjected to under *Pullman*. *E.g.*, ALI STUDY, *supra* note 80, at 283-84. Another problem is the obscurity of the *Pullman* criteria. See Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 697-98 (1981) (advocating the abolition of the *Pullman* doctrine); see also Currie, *The Federal Courts and the American Law Institute Part II*, 36 U. CHI. L. REV. 268, 317 (1969) (advocating the abolition of the *Pullman* doctrine); Note, *Judicial Abstention*, *supra* note 162, at 223 n.17 (citing numerous authorities critical of the *Pullman* doctrine). It has been suggested that the doctrine may actually be counterproductive to interests of federalism. H. FRIENDLY, *supra* note 21, at 102.

223. It should be possible for the Court to overrule *England* without disturbing the few opportunities that now exist for federal courts to certify state-law questions to state high courts. See *supra* note 140. It is doubtful whether state high courts would have the jurisdiction or the inclination to use certification proceedings to reach and decide federal issues. It is also unlikely that state doctrine would view such proceedings as precluding matters beyond the scope of the state-law inquiry.

224. It is axiomatic that the Supreme Court cannot amend a congressional enactment. While

Preclusion and Choice of Law

VI. Section 1738 and Authority to Give Greater Preclusive Effect to Judgments: A Reconciliation

A. *The Basis for Limited Federal Court Autonomy*

Concurring in *Migra*, Justice White expressed doubt whether realization of section 1738's purpose required federal courts to give no greater preclusive effect to state judgments than state courts would give them.²²⁵ Although he noted that important federal preclusion policies might be served by permitting federal courts to give greater preclusive effect to state judgments,²²⁶ he concluded: "The contrary construction of § 1738 is nevertheless one of long standing, and Congress has not seen fit to disturb it, however justified such an action might have been."²²⁷

Justice White is correct in questioning the wisdom of a blanket application of section 1738 to divest federal courts of all authority to give greater preclusive effect to state judgments. He is also correct in suggesting that a well-settled interpretation of section 1738 would be especially difficult for the court to revise.²²⁸ But Justice White was wrong in one respect: the law was not settled at the time he wrote his concurrence.²²⁹ It is not clear whether the Supreme Court hedged sufficiently in *Marrese* to preserve its options;²³⁰ in other words, whether the way still is open for the Supreme Court to hold that federal courts may give

federal courts enjoy considerable common-law authority to determine the preclusive effect of federal judgments, *see supra* notes 3-5 and accompanying text, they lost comparable authority concerning state judgments with the passage of the full faith and credit statute in 1790. *See supra* notes 77-78 and accompanying text. The Supreme Court spoke of the preemptive effect of congressional initiative on the authority of federal courts to make common law in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981):

We have always recognized that federal common law is "subject to the paramount authority of Congress." . . . Federal common law is a "necessary expedient," and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

Id. at 313-14 (citations omitted). The Supreme Court has acknowledged the limitations imposed under this principle by § 1738. *See supra* notes 153-54 and accompanying text.

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

226. *Id.*

227. *Id.* Because of his view of precedent, Justice White felt that the Supreme Court would have been warranted in concluding that "preclusion in this case must be determined under state law, even if there would be preclusion under federal standards." *Id.*

228. *See id.* On the particular weight of *stare decisis* given to the Court's settled interpretations of statutes, *see supra* note 180.

229. Justice White supported his conclusion that § 1738 has divested federal courts of the power to give greater preclusive effect to state judgments with four Supreme Court cases, the most recent of which was *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4 (1940). *Migra*, 465 U.S. at 88. He did not mention the Court's more recent neglect of state preclusion law in determining the effect of state judgments. *See supra* note 107. Nor did he note the Supreme Court's apparent acknowledgment of federal court authority to give greater preclusive effect to state judgments in *Haring v. Prosis*, 462 U.S. 306 (1983). *See infra* notes 237-44 and accompanying text.

230. *See supra* note 98.

greater preclusive effect to a state judgment without having to overrule any of its recent decisions.²³¹ A post-*Marrese* decision suggests²³² time for the development of a rationale permitting more discriminating application of section 1738 is running out. If the Supreme Court has not reached the conclusion already, it seems to be moving toward the view that section 1738 categorically forbids greater preclusion.²³³

This constrictive view of section 1738 proceeds from the erroneous assumption that if the statute does not require preclusion it invariably forbids it. Granted, if state law does not make the state judgment preclusive, a federal court cannot use section 1738 as authority to make it preclusive. But, although section 1738 protects important state interests by requiring federal courts to give as much preclusive effect to the state judgment as would state courts,²³⁴ it is less clear how or when important state interests also would be sacrificed should the federal court decide to give greater preclusive effect to the judgment.²³⁵ Section 1738 functions well as a rule of efficiency to ban without further inquiry all attempts to give less preclusive effect to state judgments,²³⁶ but it should not be applied as uncritically in greater preclusion cases.

The Supreme Court laid the groundwork for a more flexible ap-

231. The refusal of the Supreme Court to give greater preclusive effect to the Illinois judgment, see *supra* note 91 and accompanying text, can be reconciled with an interpretation of § 1738 that would permit greater preclusive effect in different and more deserving cases. See *infra* notes 277-81 and accompanying text.

232. See *Parsons Steel, Inc. v. First Ala. Bank*, 106 S. Ct. 768 (1986). This case is discussed *supra* note 100.

233. See *supra* text accompanying note 91 and note 100.

234. See *supra* notes 103, 104, 189 and accompanying text.

235. Commentators have questioned whether the federal requirement of full faith and credit should be understood to extend to the whole body of a state's preclusion law. See 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4467; Casad, *Intersystem Issue Preclusion*, *supra* note 6, at 522-23; cf. Atwood, *supra* note 50, at 70 n.54 (stating that, although the language of § 1738 reaches both situations, "Congress . . . was clearly concerned with the problem of non-recognition of sister-state judgments rather than the possibility of 'over-recognition'"). Others have maintained that forums should be entitled to apply their local rules of nonmutual issue preclusion to enforce judgments originating from states that adhere to the preclusion limitations of the mutuality doctrine. E.g., A. VESTAL, *supra* note 7, at 54-55; Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO ST. L.J. 381, 383 (1963); Scoles, *Interstate Preclusion by Prior Litigation*, 74 NW. U.L. REV. 742, 753 (1979). But see J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 3, at 695 (taking the position that the law of the place rendering the judgment should be used to settle all preclusion questions); Degnan, *supra* note 3, at 773 (same); Overton, *The Restatement of Judgments, Collateral Estoppel, and Conflicts of Laws*, 44 TENN. L. REV. 927, 948 (1977) (same). The *Restatement (Second) OF JUDGMENTS* § 86 comment g (1982).

236. "The provisions of 28 U.S.C. § 1738 require that a state judgment be given no lesser effect than it has under the law of the state whose court rendered the judgment." *RESTATEMENT (SECOND) OF JUDGMENTS* § 86 comment g (1982). In addition, see *supra* notes 59-62 and accompanying text. Of course, this is true in federal court only if another act of Congress does not function as a statutory exception to § 1738. See *supra* Part V.

Preclusion and Choice of Law

proach in *Haring v. Prosise*.²³⁷ The Court in *Haring* seemed to distinguish between the function of section 1738 in authorizing or explaining the choice of state preclusion law and the possible function of the statute in limiting choices. The Court suggested that federal judges must follow section 1738 for state judgments that would be preclusive where rendered,²³⁸ that section 1738 can only explain the application of state preclusion law,²³⁹ but that—at least in cases in which state courts would not regard the judgment as preclusive—section 1738 may not confine the choice to state preclusion law.²⁴⁰

The *Haring* Court considered whether a state criminal proceeding, concluded by respondent's guilty plea, had an issue-preclusive effect on respondent's subsequent federal civil rights action against local police authorities. The Court concluded that Virginia preclusion law would not give effect to the state judgment.²⁴¹ Under a restrictive reading of section 1738, the Court would have stopped there. Instead, the Court went on to consider whether the state judgment should preclude respondent as a matter of federal law.²⁴²

Significantly, the Supreme Court did not find section 1738 to be as dominating in *Haring's* greater preclusion setting.²⁴³ Section 1738 would have settled the matter only if state law rendered the judgment issue-preclusive. The failure of Virginia courts to regard the Virginia judgment as preclusive simply meant that petitioners would have to search beyond section 1738 for justification for their preclusion argument.²⁴⁴

The problem with *Haring* is that it is as indiscriminating in its support of federal-court autonomy as other recent decisions have been in

237. 462 U.S. 306 (1983).

238. See *id.* at 314-16.

239. See *id.* at 314 & n.8.

240. See *id.* at 316-20. This entire discussion would have been unnecessary if the Court had held that § 1738 was a per se rule against greater preclusion.

241. *Id.* at 316-17.

242. See *id.* at 316-20. With extended discussion, the Court found respondent's case for a federal rule of preclusion without merit. *Id.* For an illuminating view of the problem in *Haring* and of the general difficulties of granting issue-preclusive effects to guilty pleas, see Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27 (1984).

243. Quoting *Union & Planter's Bank v. Memphis*, 189 U.S. 71, 75 (1903), the Court said: "If the state courts would not give preclusive effect to the prior judgment, the courts of the United States can accord it no greater efficacy under § 1738." 462 U.S. at 313 n.6. It is interesting to note that Justice White quotes the same passage from the *Union & Planters' Bank* case to support his conclusion that "preclusion must be determined under state law, even if there would be preclusion under federal standards." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 88 (1984) (White, J., concurring).

244. The Court stated: "We therefore conclude that Virginia law would not bar Prosise from litigating the validity of the search Accordingly, the issue is not foreclosed under . . . § 1738." 462 U.S. at 317.

doubting the same.²⁴⁵ There are two reasons for reading section 1738 to restrict the authority of federal judges to augment the preclusive effects of state judgments. First, the preclusion goals of repose and judicial efficiency may be most easily advanced when the law of the rendering state can be depended upon to determine the preclusive scope of the judgment.²⁴⁶ Second, courts should respect attempts made by state judgments to advance local substantive policies. Although it may be easier to read a state's propreclusion position as an attempt to advance local substantive policies,²⁴⁷ the judgment-rendering court may also use a restrained theory of preclusion to advance substantive policies.²⁴⁸

Admittedly, the second reason for honoring the preclusion limitations of the rendering state is more elusive than the first. In many cases, the first reason seems adequate to support judicial application of the rendering state's rule of lesser preclusion, making unnecessary an examination of the policies underlying state law. The choice of the preclusion law of the rendering state, however, does not completely secure the advantage of certainty.²⁴⁹ By themselves, the state's interests in repose and judicial efficiency should not provide sufficient justification for forcing federal courts to abandon objectives of federal procedural policy that would be realized by giving greater preclusive effect to the state judgment.²⁵⁰ Therefore, federal law and policy should not yield unless choos-

245. See *supra* notes 91-93 and accompanying text.

246. Uncertainty is counterproductive to the purposes of preclusion. "Uncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effects of the first effort." 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4407, at 49; cf. Burbank, *supra* note 3, at 627 (noting that "simplicity and predictability . . . are important where legal rules shape litigation conduct, as do preclusion rules").

247. Subject to occasional choice-of-law considerations, the original adjudication provides the state forum with an instrument for applying local substantive rules to shape and limit the legal consequences of the controversy. State propreclusion law can be seen as a means of protecting the judicial product. Cf. Averill, *supra* note 65, at 691 (advocating an assessment of the substantive dimensions of judgments presented elsewhere for enforcement).

248. See *infra* note 271 (offering examples).

249. Professor Carrington has written that the benefits of certainty likely to flow from a rule requiring application of the rendering state's preclusion law are limited. "This single additional anchor of certainty adds little to what the attentive plaintiff may anticipate without it and surely there is no special need for uniformity, no special hazard of forum-shopping, which can be attributed to the law of judgments." Carrington, *supra* note 235, at 385. He also noted the uncertainty associated with attempts to determine the content of foreign preclusion law. "The application of foreign law, like the application of the *Erie* doctrine, requires the court to try to think with the minds of others—a process so difficult that it seems often to frustrate all thought." *Id.* (footnotes omitted). The degree of inevitable uncertainty may not be quite this great. But Professor Carrington does demonstrate the imperfections of reliance on the preclusion law of the rendering state as a means of promoting clarity. For a discussion of the process of determining foreign preclusion law, its attendant difficulties, and *Erie* doctrine analogues, see *supra* subpart IV(B).

250. Here I disagree with Professor Degnan. He concluded his superb article with the following proposed rule:

Preclusion and Choice of Law

ing the rendering state's rule of lesser preclusion is necessary to secure the state's substantive interests.²⁵¹

The choice-of-preclusion-law approach suggested in this Article brings a form of interest analysis²⁵² to the problem. Interest of the fed-

A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.

Degnan, *supra* note 3, at 773. In many, if not most, cases, I would come out the same way. But Professor Degnan's invariable choice of the preclusion law of the judgment-rendering state does not always produce desirable results. See *infra* subpart VI(B). It is for the best that "[c]ourts have not yet accepted any such clear rule." 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4466, at 618.

251. The approach taken by some federal diversity courts suggests that they would interpose state preclusion law even in such cases in which it is not necessary to secure the state's substantive interests. See, e.g., *Mackris v. Murry*, 397 F.2d 74, 81 (6th Cir. 1968) (applying Michigan state law of collateral estoppel, and requiring mutuality); *McCarty v. Johns-Manville Sales Corp.*, 502 F. Supp. 335, 338-39 (S.D. Miss. 1980) (holding that Mississippi law controlled the application of collateral estoppel, and deciding that estoppel could not be applied under either state or federal law). They would do so, not upon the conclusion that § 1738 requires federal courts to give the same preclusive effect to all state judgments, but because of a misguided conception that the *Erie* doctrine applies. The interpretation of the Rules of Decision Act, 28 U.S.C. § 1652 (1982), required by the *Erie* doctrine is explained and compared to the approach under § 1738 in *supra* notes 132-47 and accompanying text. There is no question that the preclusion position taken by federal courts is bottomed on concerns of judicial administration that are procedural in character. See *infra* notes 253, 263-65 and accompanying text. And the *Erie* doctrine has never been used by the Supreme Court to displace federal law when to do so would sacrifice clear federal procedural interests. When such interests have been at stake, federal law has prevailed over contrary state law. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). It is in keeping with the modern and, I think, correct view to suggest that the *Erie* doctrine is a red herring in the judgment-enforcement context and that § 1738 provides a proper and sufficient standard for such cases. See Degnan, *supra* note 3, at 750, 769-70 (commenting that when state judgments are presented in federal court, "*Erie* has no voice on the issue").

Erie works some mischief if applied to state-judgment cases. Granted, in many cases in which federal courts are asked to give greater effect to state judgments, § 1738 too should require the application of state preclusion law. See *supra* text following note 248. The application of *Erie* would do no great harm in such cases because it merely substitutes § 1652 for § 1738 as the basis for the result. However, because federal courts should be free to follow their own law of nonmutual issue preclusion in the proper circumstances, see *infra* subpart VI(B), cases that follow *Erie* to choose a state rule of mutuality are wrong in both approach and result. See *Mackris*, 397 F.2d at 81 (continuing state court's requirement of mutuality for the offensive use of collateral estoppel); *McCarty*, 502 F. Supp. at 338-39 (following state's prohibition of collateral estoppel when mutuality is lacking).

252. Interest analysis is a cornerstone of contemporary choice-of-law analysis. It is used to resolve apparent conflicts between the rules of two or more different jurisdictions. Interest analysis is the technique of determining the true extent of conflict by examining the policies behind the rules vying for acceptance. Professor Brainerd Currie deserves considerable credit for developing the approach through his writings. E.g., B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171. See generally Shreve, *Currie's Government Interest Analysis—Has It Become a Paper Tiger?*, 46 OHIO ST. L.J. 541 (1985) (discussing the contributions of Professor Currie at greater length). Other influential works include Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933), and Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1959). Interest analysis has figured prominently in the work of the most influential modern commentators. See R. LEFLAR, *AMERICAN CONFLICTS LAW* (3d ed. 1977); A. VON MEHREN & D. TRAUTMAN, *supra* note 32, at 77; R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 7-8 (3d ed. 1986).

With one exception, Lewis, *Mutuality in Conflict—Flexibility and Full Faith and Credit*, 23

eral enforcement forum in having a rule of greater preclusion applied exists to the extent that federal procedural policies are implicated. Interest of the state court in having its rule of lesser preclusion applied exists to the extent that its substantive policies are implicated. When a state's position derives from a procedural concern, for example, that its courts not treat litigants unfairly, that policy does not support the state's rule of lesser preclusion when its judgment is offered for enforcement elsewhere.²⁵³ When the state rule of lesser preclusion is intended to facilitate a substantive policy—to help make real that state's vision of the behavioral expectations and demands of its substantive law²⁵⁴—the picture changes. The established reading of section 1738 to guarantee as much preclusive effect to a state judgment in federal court proceeds, at least in part, from the need to give intersystem effect to a state court's attempt to bind the parties in the case to its conception of rights and duties.²⁵⁵ The rendering state's attempt to address the same matters by refusing to bind the parties is a difference only in technique. It should be treated with no less respect.

Federal courts should not be permitted simply to characterize the question as procedural and apply their own preclusion law.²⁵⁶ Genuine

DRAKE L. REV. 364 (1974), interest analysis does not seem to have played much of a role in choice of preclusion law. In his interesting article, Professor Lewis takes the somewhat radical position that state courts should be free to augment the preclusive effects of sister-state judgments simply upon a showing that the enforcement state has an interest in having its rule of greater preclusion applied. *See id.* at 385.

Some may object to using interest analysis in choice of preclusion law, because they think of preclusion law as securing party prerogatives rather than advancing the interests of systems in having their preclusion law applied. Party interests and governmental interests supporting preclusion greatly overlap. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4403, at 12-15. Preclusion arguments protect litigants and provide a mechanism for advancing the system's policy ends. But the benefits of preclusion should be available even in the absence of party initiatives. *Cf.* *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980) (holding that district court is authorized to raise *res judicata* issue *sua sponte*).

253. *See infra* text accompanying notes 263-64. Federal courts considering such judgments are presented with what interest analysis would consider a "false" conflict. False conflicts occur either when the rules produce the same result or (as here) the outcome of the case is capable of frustrating policy supporting only one of two ostensibly conflicting rules. E. SCOLES & P. HAY, *CONFLICT OF LAWS* 17 (1982). The reach of state *procedural* policies does not extend to the federal case. Therefore no legitimate state policies will be sacrificed if the federal court applies its rule of nonmutual preclusion instead of the mutuality rule of the judgment-rendering state.

254. The substance-versus-procedure distinction can be misused, a fact made clear by Justice Frankfurter in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). But the distinction does seem useful as a means of expressing the difference between "the body of rules which define legal rights, that is, . . . the claims which people make on one another and recognize as valid," and rules "structuring and regulating the judicial process." Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678, 696 (1976) (footnotes omitted). As Justice Frankfurter seemed to suggest, the distinction is serviceable so long as an effort is made to remember that "[e]ach implies different variables depending upon the particular problem for which it is used." 326 U.S. at 108.

255. *See supra* notes 103-04, 188-89 and accompanying text.

256. Under the traditional choice-of-law approach, courts have frequently used the procedural

Preclusion and Choice of Law

procedural concerns often justify favoring local law in a traditional choice-of-law setting.²⁵⁷ But section 1738 must be read to confine federal court access to their own preclusion rules, even when the policies supporting those rules are implicated. Only when the judgment-rendering state is uninterested in the choice-of-law outcome should the way be free for federal courts to give expression to federal preclusion policies.

This analysis provides a framework for the development of a more discriminating theory of interpretation for section 1738 in greater preclusion cases. Under section 1738, federal courts should respect the preclusive limitations of many state judgments, including, as shall be seen, the Illinois judgment in *Marrese*.²⁵⁸ In other cases, the statute should be read to permit federal courts freedom to give more preclusive effect to state judgments. Perhaps the most evident category of cases for which freedom of greater preclusion should exist is that involving nonmutual issue preclusion.

B. Authority to Disregard State Mutuality Limitations—A Suggested Enclave of Federal Court Autonomy

Federal courts have dispensed with the mutuality requirement when determining the issue-preclusive effects of federal judgments.²⁵⁹ Most states have also dispensed with the requirement;²⁶⁰ however a minority have not.²⁶¹ Should a federal court honor the preclusive limitations of the mutuality doctrine when presented with state judgments from mutuality jurisdictions?

The mutuality doctrine was purged from intramural federal preclusion law in order to conserve federal judicial resources that would otherwise be expended in relitigation of issues.²⁶² It is difficult to see how the

characterization as an a priori justification for selection of their own law. See E. SCOLES & P. HAY, *supra* note 253, at 58-59; R. WEINTRAUB, *supra* note 252, at 53.

257. In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the Supreme Court used the due process clause to strike down the Texas courts' attempts to favor local law through implausible characterization of an issue as procedural. So long, however, as forum law does address what can reasonably be described as procedural concerns, it need not give way to conflicting law.

Enormous burdens are avoided when a court applies its own rules, rather than the rules of another state, to issues relating to judicial administration, such as the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs. . . . Even if the outcome would be altered, . . . the forum will usually apply its own rule if the issue primarily concerns judicial administration.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 comment a (1971).

258. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

259. For an explanation of the mutuality doctrine, see *supra* text accompanying note 15. The Supreme Court's rejection of the doctrine is discussed *supra* notes 18-20 and accompanying text.

260. See *supra* note 39 and accompanying text.

261. See *supra* note 40 and accompanying text.

262. Concern for the conservation of judicial resources is particularly strong within the federal court system. See *supra* notes 21, 24-27 and accompanying text.

interest of federal courts in advancing these federal procedural concerns diminishes when they encounter state judgments.²⁶³ If the mutuality doctrine was an instrument for advancing substantive policies, federal courts should be bound under section 1738 to honor the mutuality doctrine. Because this is not so, however, federal courts should be free to give effect to the judgments of mutuality states according to the federal law of nonmutual issue preclusion.

A state's election to restrain the enforcement of its own judgments through the mutuality doctrine has nothing to do with the process of defining and limiting substantive rights. The interests that the mutuality doctrine advances are procedural, not substantive, in character. The doctrine prohibits use of an adjudication to bind one who could not have profited from the judgment had the case turned out differently. It represents a value judgment bottomed on concerns of procedural fairness—the adjudications of a system should not be available for use on a one-way basis.²⁶⁴ States have a right to supplement federal due process in promoting particular ideas of procedural fairness. They have a right to employ the mutuality doctrine to shield litigants from what they perceive to be unfair use of their own courts. But this concern is not implicated when their judgments are presented for enforcement in a federal court. The legitimate interest of state mutuality jurisdictions in protecting litigants does not extend to protecting federal litigants from the intended effects of federal issue preclusion doctrine.

Federal courts should draw upon two sources in determining the fair limits of issue preclusion to be given to state judgments: the Constitution and federal preclusion law and policy. Developments in the latter area led to rejection of the mutuality doctrine. This was accomplished through a new conception of procedural fairness, one in which fairness to the courts and the public was also taken into account. Strangers could bind those who had previously obtained an adjudication of the issue whenever it would not be unfair to do so.²⁶⁵

Two due process questions should be noted at the constitutional

263. As Chief Justice Burger observed in *Marrese*, "federal courts have direct interests in ensuring that their resources are used efficiently and not as a means of harassing defendants with repetitive lawsuits, as well as in ensuring that parties asserting federal rights have an adequate opportunity to litigate those rights." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 390 (1985) (Burger, C.J., concurring); cf. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 88 (1984) (White, J., concurring) ("If the federal courts have developed rules of *res judicata* and collateral estoppel that prevent relitigation in circumstances that would not be preclusive in state courts, the federal courts should be free to apply them, the parties then being free to relitigate in the state courts.").

264. For further discussion, see *supra* note 20.

265. The focus of the succeeding test shifted from the person wishing to use the doctrine to the one against whom it was invoked. *Id.*

Preclusion and Choice of Law

level. The first and easiest is whether nonmutual issue preclusion is itself constitutional. The Supreme Court has made clear that it is.²⁶⁶ The second question initially seems more troublesome. Is a party to a prior adjudication denied due process if she is precluded under circumstances that would not have led to preclusion under the law of the state rendering the judgment?²⁶⁷ The due process concern is over the possibility of unfair surprise.²⁶⁸ To prove unfair surprise, the litigant would have to argue two points. First, that a reading of the mutuality law of the forum at the time the case was tried did not give her notice of the possibility that the judgment could generate the greater preclusive effects of nonmutuality. Second, that the litigant reasonably relied on the mutuality doctrine to measure her stake in the outcome of the suit and therefore failed to devote resources to the trial or appeal of the case commensurate with the higher stakes possible under nonmutuality.²⁶⁹

On closer examination, a due process objection to application of the federal rule of nonmutual issue preclusion in such cases would be of doubtful weight. Because many jurisdictions have overruled their promutuality precedents,²⁷⁰ it may be unreasonable for any attorney litigating in a mutuality jurisdiction to rely on the fact that the law will not be changed when or before the judgment is presented for enforcement there. Moreover, a litigant who investigated the matter would discover that the law concerning the obligation of other courts²⁷¹ to enforce the state mutuality limitations is unclear. This hardly presents a suitable climate for the argument of unfair surprise.

C. The Appropriate Use of Section 1738 to Honor State Law in Greater Preclusion Cases: Marrese and Other Examples

Federal courts have developed a broad definition of a claim in their intramural law of claim preclusion.²⁷² The majority of states have done

266. See authorities cited *supra* note 17.

267. See *Atwood, supra* note 50, at 70 n.54 (suggesting that giving greater preclusive effect to a judgment could lead to due process complications); *Casad, Intersystem Issue Preclusion, supra* note 6, at 517 (same).

268. *Casad, Intersystem Issue Preclusion, supra* note 6, at 526-27.

269. It is easy to base a refusal to employ nonmutual issue preclusion on the failure to satisfy the prerequisites of the doctrine itself rather than on constitutional grounds. For examples of sensitivity of the doctrine to possibilities of unfair surprise, see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (discussed *supra* note 20), and *RESTATEMENT (SECOND) OF JUDGMENTS* § 29 (1982).

270. See *supra* note 29.

271. The Supreme Court has yet to restrict state courts from giving lesser preclusive effect to judgments. See, e.g., *Finley v. Kesling*, 105 Ill. App. 3d 1, 6-8, 433 N.E.2d 1112, 1116-18 (1982) (refusing to honor the mutuality limitation that Indiana preclusion law imposed on an Indiana judgment); *Hart v. American Airlines, Inc.*, 61 Misc. 2d 41, 45, 304 N.Y.S.2d 810, 814-15 (N.Y. Sup. Ct. 1967) (refusing to honor Texas' mutuality limitation).

272. See *supra* notes 12-13 and accompanying text.

the same.²⁷³ This permits use of claim preclusion to discourage claim splitting and resulting piecemeal litigation. A minority of states, however, adhere to a narrower claim definition, which permits claim splitting.²⁷⁴ Section 1738 should not leave federal courts free to use the broader claim definition of federal law to give claim-preclusive effect to judgments from states permitting claim splitting. As in the area of mutuality, strong federal procedural interests are at stake, but, unlike the doctrine of mutuality, policies that underlie state law permitting claim splitting appear substantive in character.

The policies supporting the federal rule against claim splitting seem to be as fully implicated when federal courts are presented with state judgments as when they are presented with judgments of their own. The policies are procedural²⁷⁵ and twofold. The first concerns judicial administration. Broad claim definition averts the wasteful expenditure of federal judicial resources on repetitive litigation by coercing, through threat of claim forfeiture, the consolidation of claims in the original proceeding. In this sense, a rule against claim splitting is akin to the forum's procedural law concerning compulsory counterclaims.²⁷⁶ The second procedural policy derives from the court's concern that parties before it be treated fairly. Claim splitting is unfair to the party opposing the claim in the succeeding case, because it is likely to prolong conflict and increase the expense of litigation.

Although the policies behind some states' tolerance of claim splitting are more difficult to ascertain, they have been treated as substantive,²⁷⁷ and that characterization seems warranted. Perhaps the easiest way to understand the substantive nature of a rule permitting claim splitting is to reason, a step at a time, from the basic premise underlying why courts hear cases at all. Courts entertain claims because they are duty bound to make real the behavioral demands and expectations of substantive law. Most, probably all, jurisdictions have means of demonstrating that the duty to adjudicate controls even in the face of repetitious litigation, so long as there are extenuating circumstances.²⁷⁸ Claim-splitting

273. See *supra* note 29.

274. This is most notable in accident cases. See *supra* note 38 and accompanying text.

275. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 29, at 658; von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1604 (1968).

276. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 29, at 658. For an illuminating comparison of counterclaim and preclusion rules, see Scoles, *supra* note 235, at 753-54.

277. See *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 829-30 (1952) (suggesting how interests underlying the law of commercial transactions and of domestic relations might be advanced when courts permit successive lawsuits).

278. Relief in such cases may be built into claim-preclusion doctrine, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 26 comment j (1982) (misrepresentation through fraud or innocent misrep-

Preclusion and Choice of Law

states simply take concern for the vindication of substantive principles one step further by permitting successive suits in the absence of extenuating circumstances. Therefore, in this context, section 1738 should be read to prohibit a federal court from using a state judgment to preclude a claim that would not be precluded under the law of the judgment-rendering state.²⁷⁹

For the moment, let us assume that Illinois law permits the kind of claim splitting necessary for the plaintiffs to bring successive suits in courts of limited and general jurisdiction.²⁸⁰ In that case, the *Marrese* Court was correct to reject the possibility that section 1738 could permit the lower federal courts to give claim-preclusive effect to the judgments.²⁸¹ Giving greater claim-preclusive effect to the Illinois judgments could undercut Illinois' substantive policy favoring use of a second suit.

The complication of exclusive federal jurisdiction in *Marrese* poses an added threat to Illinois' substantive interests. If federal courts gave claim-preclusive effect to Illinois judgments like the one in *Marrese*, Illinois state courts would have fewer opportunities to interpret their state antitrust statutes. This would happen if plaintiffs initially file in federal court in order to preserve their federal antitrust claims and also plead their state antitrust claims upon a theory of pendent jurisdiction.²⁸²

resentation of the defendant), or it may have an extrinsic source, e.g., FED. R. CIV. P. 60(b)(1) (relief from the judgment on grounds of "mistake, inadvertence, surprise or excusable neglect"). A motion under Federal Rule of Civil Procedure 60(b)(1) must be made within a year of the entry of judgment, but, by itself, the motion does not affect the preclusive authority of the judgment. Federal courts take a similar view regarding the effect of appeals. See 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4427, at 270-71 ("Should the judgment be vacated by the trial court or reversed on appeal, however, res judicata falls with the judgment.").

279. A federal court would do violence to state substantive interests by using its own rule of preclusion to adjudicate adversely the merits of plaintiff's claim. If the successive claim was within the jurisdiction of the state court that rendered the original judgment, the frustrated plaintiff might try bringing a third suit there. But the defendant could plead the judgment from the intervening federal case to deny plaintiff access to the claim-splitting advantages of state forum law.

Commentators have suggested that, instead of reaching the merits of these claims, prepreclusion forums can promote their policies of efficiency and resource conservation in a manner less disruptive to the interests of claim-splitting states by dismissing the claims without prejudice. 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4467, at 645-48; Carrington, *supra* note 235, at 386-87. The suggestion merits careful consideration. It furthers procedural policies against free expenditure of federal court resources, see *supra* text following note 276, and is preferable to allowing a federal court to give preclusive effect to the first judgment from a claim-splitting state. However, the troublesome question remains whether, in light of § 1738, federal courts have authority to decline to give life to the substantive policies that may accompany a state judgment by dismissing suits without prejudice. See *supra* note 254 and accompanying text.

280. The question is discussed *supra* note 128. The Supreme Court directed an examination of Illinois preclusion law on remand. See *supra* text accompanying note 76.

281. See *supra* note 91 and accompanying text.

282. So long as "a common nucleus of operative fact" can be demonstrated between the jurisdictionally self-sufficient federal antitrust claim and the state antitrust claim, a federal court may adjudicate the state claim upon a theory of pendent jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

Plaintiffs probably would seek pendent jurisdiction over their state anti-trust claims to avert possible loss of the latter from the claim-preclusive effect of a federal judgment.²⁸³ Granted, in the absence of diversity, another federal court would not have the opportunity to measure the preclusive effect of the federal judgment because the pendent state claim would not provide a basis for federal subject-matter jurisdiction. This is a reverse image of the paradox encountered in *Marrese*.²⁸⁴ And, just as the lack of an opportunity for state courts to pass on precisely the same preclusion issue does not itself demonstrate in *Marrese* that state preclusion law is inapplicable,²⁸⁵ a similar inability of federal courts to make the particular preclusion determination should not rule out the possibility that federal preclusion law controls.²⁸⁶

The attorneys general of Illinois, Indiana, and Wisconsin argued as amici that claim preclusion in *Marrese* would have an eviscerating effect on the development of state antitrust law.²⁸⁷ The purposes of exclusive federal jurisdiction are to promote the coherent and uniform development of federal law.²⁸⁸ States presumably have the same interest in the authoritative development of their law. Although it is questionable whether state legislatures can endow their courts with exclusive jurisdiction,²⁸⁹ state courts at least seem entitled to the full opportunity to elaborate and refine the meaning of state law through the exercise of concurrent jurisdiction over state antitrust claims.

283. There is considerable support for the argument of preclusion in this context. See 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4412, at 97 n.14; Note, *The Res Judicata Implications of Pendent Jurisdiction*, 66 CORNELL L. REV. 608, 609 (1981); cf. RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment e, illustration 10 (1982) (stating that "unless it is clear that the federal court would have declined as a matter of discretion to exercise [pendent] jurisdiction . . . the state action is barred"). The *Restatement (Second)* position was endorsed by concurring Justices Blackmun and Marshall and by dissenting Justice Brennan in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 404 (1981) (Blackmun & Marshall, JJ., concurring), 411 (Brennan, J., dissenting).

284. See *supra* text preceding note 120.

285. See *supra* note 125 and accompanying text.

286. This view is supported by the fact that Justices Brennan, Marshall, and Blackmun appear to have taken their propreclusion position in *Moitie* as a matter of intramural federal law. See *supra* note 283; cf. 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4412, at 97 n.14 (suggesting it is appropriate for a federal court to enjoin as precluded a state adjudication of a claim that should have been presented under a theory of pendent jurisdiction in a prior federal adjudication).

287. In their amicus brief filed in the Supreme Court, they argued that such a result might "strip the states of their right to formulate their own state antitrust policies because plaintiffs will be filing directly in federal court to insure full relief." Brief of the States of the Seventh Circuit, Illinois, Indiana, and Wisconsin, on Behalf of the Petitioners, at 12; *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). They argued that this would lead to "federal judges, rather than state courts, molding the Illinois Antitrust laws." *Id.*

288. See *supra* note 162 and accompanying text.

289. Cf. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270 (1980) (plurality opinion) (rejecting a state's attempt "directly to determine the extraterritorial effect" of its worker's compensation awards); *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) (refusing to permit a state court to protect its jurisdiction by enjoining a suit filed in federal court).

Preclusion and Choice of Law

Of course, it is possible to overstate the adverse effect claim preclusion in *Marrese* might have on the development of state antitrust law; federal courts have considerable discretion to refuse to exercise pendent jurisdiction over state claims.²⁹⁰ A plaintiff's unsuccessful attempt to invoke pendent jurisdiction should insulate her from the preclusive effects of the resulting federal judgment,²⁹¹ leaving the way clear for a subsequent state court adjudication of the state antitrust claim. Furthermore, there is some indication that state forums would continue to attract state antitrust litigation, even if plaintiffs forfeited their federal claims by filing there.²⁹² Still, the prospect of an impairment of Illinois' interest in developing its substantive law seems real enough to give added weight to the conclusion that section 1738 should not leave the federal court free in *Marrese* to apply a federal rule of greater preclusion.

VII. Conclusion

This Article began by noting two realms of preclusion law in federal court: (1) the intramural realm, in which federal courts have considerable autonomy to fashion doctrine governing the preclusive effects of federal judgments; and (2) the intersystem realm, in which section 1738 imposes an obligation on federal courts to honor state judgments comparable to the obligation imposed on the courts of sister states by the full faith and credit clause of the Constitution.

Issues of federal intramural preclusion law may be taxing, but they usually are free of the complications of choice of law. Federal cases involving state judgments could be equally free of choice-of-law complications if federal courts always settled preclusion questions by referring to the state preclusion law of the court rendering the judgment. Section

290. The power to take pendent jurisdiction over a state claim "need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); see also C. WRIGHT, *supra* note 25, at 105-07 (discussing criteria influencing the Court's decision in *Gibbs*).

291. See 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 4412.

292. See *supra* text accompanying notes 157-61. Professor Hovenkamp wrote:

[T]he notion that federal antitrust law is aggressive while state law is passive is largely a thing of the past. Since the early 1970's the United States Supreme Court has gradually restricted the scope of federal antitrust liability and narrowed the range of private persons who may sue for antitrust violations. On the other hand, many states have broadened the scope of their antitrust laws and have granted standing to a broader class of plaintiffs than have a cause of action under the federal laws. As a result, activities that are not illegal under federal law are condemned by the antitrust law of some states. Furthermore, some persons who have suffered injury because of antitrust violations have a damages action under various state antitrust laws while they have no such action under the federal statutes.

Hovenkamp, *supra* note 159, at 376-77 (footnotes omitted).

1738 will require this in most cases; however two exceptions currently exist and two more should be adopted.

Federal courts are not required by section 1738 to accept the conclusion of state law that a judgment of that state is preclusive when: (1) state preclusion law would produce an unconstitutional result, or (2) another congressional enactment creates an exception to section 1738. Although the law currently is unsettled, the Supreme Court should make clear that federal courts are not confined to state preclusion law in two additional situations: (1) when state preclusion law is so undeveloped or confused that it does not suggest an answer to the preclusion problem that the state judgment poses, or (2) when the federal court can advance the objectives of its intramural rule of greater preclusion without interfering with any policies that underlie the state's rule of lesser preclusion.

It is difficult to formulate general principles to aid in determining when exercise of exclusive federal jurisdiction should function as an implied exception to section 1738. But, the Supreme Court should provide more guidance than it has when it suggested that the creation of exclusive federal jurisdiction cannot, in and of itself, be read to imply an exception to section 1738. An implied exception should be found only if preclusion by state law would so frustrate the purposes served by the particular grant of exclusive jurisdiction as to make suspension of section 1738 essential to the grant. From the vantage provided in *Marrese*, it does not appear that the difference in the effective operation of exclusive federal antitrust jurisdiction, with or without the suspension of section 1738, usually would be great enough to justify an implied exception.

The interests served in giving state judgments their intended effect are equally strong when federal concurrent jurisdiction is at stake. Because it is impossible to argue—as one can attempt to do concerning exclusive federal jurisdiction—that suspension of section 1738 is essential to a grant of concurrent jurisdiction, the implied-exception argument is far less likely to be convincing. Therefore, the Supreme Court was correct in its much-criticized refusals to imply an exception to section 1738 based on Title 42, section 1983.

Absent a statutory exception, the Court has consistently and correctly read section 1738 to require federal courts to give state judgments at least the preclusive effect they have under state law. In light of this rule, the Court's requirement that inquiries begin with an examination of state law makes sense. But the Court needs to provide far more guidance for situations in which no state law appears to be on point. The Supreme Court has greater freedom under section 1738 than it does under section 1652 to develop a flexible and pragmatic approach for coping with un-

Preclusion and Choice of Law

clear state law. Section 1738 should be read to require federal courts to give preclusive effect to state judgments, not only when preclusion is supported by apposite state precedents, but even when a reading of state preclusion law only *suggests* preclusion. When state law provides no answer, however, federal courts should be permitted to revert to federal preclusion law and policy.

Recent Supreme Court decisions reveal a disturbing drift toward the conclusion that section 1738 categorically prohibits federal courts from giving preclusive effects to state judgments when the courts rendering them would not do so. At the same time, the Court has yet to discuss the greater preclusion problem thoughtfully or at any length. The subject needs more extensive examination than the Court has given it so far. To use the state law of the rendering forum to establish the preclusive effect of a judgment gives the judgment an element of certainty, which complements the underlying policies of preclusion. But, alone, the advantages of certainty are not great enough to justify the selection of a state rule of lesser preclusion when federal interests secured by a rule of greater preclusion would be sacrificed.

Section 1738 should be read to leave federal courts free to augment the preclusive effects of a state judgment whenever doing so would not frustrate the purpose behind the state's rule of lesser preclusion and would advance the purpose behind the federal rule of greater preclusion. This approach brings to the choice-of-preclusion-law question a form of interest analysis more commonly associated with traditional choice of law. The approach does not support greater preclusion in *Marrese*, but does suggest that federal courts may, at least, apply their own law of nonmutual issue preclusion to overcome the mutuality limitations of state law.

