Notre Dame Law Review

Volume 74
Issue 4 *Federal Practice & Procedure Issue*

Article 4

5-1-1999

Rooker-Feldman Doctrine: Evaluating Its Jurisdictional Status

Susan Bandes

THE *ROOKER-FELDMAN* DOCTRINE: EVALUATING ITS JURISDICTIONAL STATUS

*Susan Bandes**

I. INTRODUCTION

A close, critical look at the underpinnings of the *Rooker-Feldman* doctrine is overdue. *Rooker-Feldman*, which joined the ranks of forum allocation doctrines as recently as 1983,[1] possesses several characteristics that make critical attention especially important. The doctrine has emerged as perhaps the primary docket-clearing workhorse for the federal courts, leading to the dismissal of about five hundred cases in the last seven years.[2] What is most troubling about the reliance of the lower federal courts on this doctrine is the disjunction between its heavy use and the lack of attention or articulation the doctrine has been accorded. Its rapid rise and expansion occurred almost entirely below the radar. In the sixteen years of the doctrine's existence, the Supreme Court has barely commented on it. It may be a measure of the doctrine's status with the High Court that Justice Scalia referred to it in the *Pennzoil* case as the "so called *Rooker-Feldman* doctrine."[3] Federal courts scholars and casebook authors, most likely taking their cue

* Professor of Law, DePaul University. I wish to thank Erwin Chemerinsky and Bill Marshall for their incisive comments on earlier drafts, my co-panelists Jack Beermann, Barry Friedman, and Suzanna Sherry for their excellent comments on the Article and for a wonderfully collegial exchange of views, and Tom Rowe for making it all possible. Thanks also to Rebecca Morse and Jessica Thomas for their research assistance.

1 The doctrine is based on the cases of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). However, in *Rooker* itself, the doctrine was narrowly defined, *see infra* notes 19–28 and accompanying text, and in the sixty years between *Rooker* and *Feldman*, courts rarely relied on *Rooker* to dismiss cases.

2 *See* Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine in Action*, 74 NOTRE DAME L. REV. 1085 (1999).

3 Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 18 (1987) (Scalia, J., concurring).

from the Supreme Court's lack of attention to the doctrine, have themselves given it little or no attention.[4]

The development of the *Rooker-Feldman* doctrine has suffered from the lack of attention. A review of many of the lower court opinions[5] reflects that the lower courts, in attempting to delineate the doctrine's scope, have spawned a complex, confusing, and sometimes contradictory body of precedent. Much of this precedent finds the doctrine applicable in contexts that arguably extend well beyond what the Supreme Court has thus far authorized, and certainly extend beyond what any defensible rationale for the doctrine would support. Although the opinions at times attempt to grapple with the doctrine's complexities, often the reasoning is sparse and unhelpful. In short, the *Rooker-Feldman* doctrine provides the rationale for a significant amount of forum shifting, and the rationale is unaccompanied by sufficient thought or articulation.

The forum shift is of particular concern because the *Rooker-Feldman* doctrine is held to be of jurisdictional magnitude. When a litigant brings federal claims subsequent to a state court suit, the filing of the second suit raises several possibilities. One is that he is engaging in redundant relitigation of an identical issue and ought to be precluded on nonjurisdictional grounds. Another is that he is bringing a new, federal cause of action which is not redundant and which the federal court has jurisdiction to consider as an original matter. The third possibility is that he is complaining of the result in the state court suit and asking the federal court to entertain an appeal of that

4 Since the 1983 decision in *Feldman*, there have been a handful of student notes and comments addressing the doctrine. *See* Benjamin Smith, Note, Texaco, Inc. v. Pennzoil, Inc*: Beyond a Crude Analysis of the* Rooker-Feldman *Doctrine's Preclusion of Federal Jurisdiction*, 41 U. MIAMI L. REV. 627 (1987); Gary Thompson, Note, *The* Rooker-Feldman *Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 RUTGERS L. REV. 858 (1990). Some articles on topics like preclusion briefly mention the doctrine. *See* Jack Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 340–45 (1988); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 973, nn.129–34 (1998); *see also* Michael Finch & Jerome Kasriel, *Federal Court Correction of State Court Error: The Singular Case on Interstate Custody Disputes*, 48 OHIO ST. L.J. 927, 973–77 (1987). For federal courts casebooks discussing the doctrine, see RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1500–04 (4th ed. 1996) [hereinafter HART & WECHSLER]; MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 575–84 (4th ed. 1998).

5 Many of these are actually very brief unpublished dispositions. For example, of 39 Seventh Circuit Court of Appeals decisions on *Rooker-Feldman* grounds between January 1996 and September 1998, 26 were one- or two-page unpublished dispositions.

result. *Rooker v. Fidelity Trust*[6] stood for the narrow and uncontroversial principle that a federal district court is not the proper place for parties to appeal issues actually decided against them in state court. This principle, for reasons I will examine in detail, is termed jurisdictional. Once this third and last possibility is broadly construed to encompass settings beyond the narrow *Rooker* situation, it becomes very difficult to distinguish it from the first and second possibilities. Yet, only the third possibility invokes a jurisdictional bar against federal jurisdiction, and thus it must be distinguished from the first two possibilities with care.

Why does it matter whether the *Rooker-Feldman* doctrine is jurisdictional in nature? It matters very much if the doctrine has been used to shift hundreds of cases to state court that would otherwise have been decided in federal court. But if Barry Friedman is correct, most of these cases would have been barred from federal court on preclusion or abstention grounds.[7] Unfortunately, there is no reliable way of determining how many such cases would have proceeded absent the *Rooker-Feldman* doctrine. However, when cases are dismissed under a jurisdictional doctrine which would otherwise be dismissed or postponed under a nonjurisdictional doctrine, this decision has consequences of its own.

Courts routinely profess that due to the doctrine's inflexible jurisdictional nature, they have no choice but to dismiss under *Rooker-Feldman*.[8] If the doctrine is jurisdictional, that status has several obvious consequences. Courts have a duty to raise *Rooker-Feldman* problems sua sponte.[9] The *Rooker-Feldman* bar is not waivable by the parties. It requires the application of federal law to determine its applicability, and thus will sometimes require federal dismissal though dismissal would not have been necessary under state law.[10] Unlike such forum allocation doctrines as *Younger* abstention[11] or preclusion,[12] *Rooker-*

6 263 U.S. 413 (1923)

7 *See* Barry Friedman & James E. Gaylord, Rooker-Feldman *From the Ground Up*, 74 NOTRE DAME L. REV. 1129 (1999).

8 *See* GASH Assocs. v. Village of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993); *In re* Goetzman, 91 F.3d 1173 (8th Cir. 1996).

9 *See* Garry v. Geils, 82 F.3d 1362, 1364–65 (7th Cir. 1996).

10 *See* Beermann, *supra* note 4, at 340–48.

11 *See* Guarino v. Larsen, 11 F.3d 1151, 1159 n.4 (3d Cir. 1993) (noting that questions of inadequate state forum that would be relevant in an abstention context are not relevant in the jurisdictional *Rooker-Feldman* context).

12 *See* Bates v. Jones, 131 F.3d 843, 862–63, n.2 (9th Cir. 1997) (en banc) (Fletcher, J., concurring in part and dissenting in part) (noting that *Rooker-Feldman*, unlike res judicata, is a jurisdictional, nonwaivable bar). Though California recognizes a public interest exception to the res judicata doctrine, *see Bates*, 131 F.3d at 845,

Feldman is inflexible, and may not contain the exceptions that soften those doctrines, like the full and fair hearing or public interest exceptions. Because of its jurisdictional status, it is said to trump nonjurisdictional policies like the preference for a federal forum in civil rights cases.[13]

The doctrine's jurisdictional status also has more subtle and pervasive consequences. It gives courts implicit permission to fail to discuss the policies inherent in the decision to deny jurisdiction, on the apparent theory that since the doctrine is mandatory, such policies are irrelevant. To put it another way, it gives the illusion of a lack of judicial choice and responsibility. Moreover, it seems to obviate the need to balance the doctrine against countervailing doctrines. This is a predictable consequence when *Rooker-Feldman* faces off against nonjurisdictional doctrines, like preclusion and abstention, but less so when the conflict arises from interpretation of the jurisdictional mandates of 28 U.S.C. § 1331[14] and § 1343.[15] The doctrine's jurisdictional status also has potentially devastating consequences for 42 U.S.C. § 1983, the primary vehicle for the litigation of federal constitutional claims, which, though not itself a jurisdictional statute, is inseparably intertwined with various jurisdictional rules, both statutory and judicial.

Although for some time those jurists and commentators who focused on the doctrine tended to dismiss it as harmless,[16] salutary,[17] or interchangeable with preclusion doctrines,[18] it has become clear that it is neither harmless nor interchangeable. As long as its jurisdictional underpinnings go unexamined, it will be difficult to assess whether the doctrine is being wrongly construed or whether the harms it causes are justified. Thus, my focus in this Article will be on evaluat-

---

such an exception would not be possible for a jurisdictional bar like the *Rooker-Feldman* doctrine. *See also* Blake A. Snider, Recent Case, *Ninth Circuit Ignores Principles of Federalism and the* Rooker-Feldman *Doctrine*: Bates v. Jones, 21 HARV. J.L. & PUB. POL'Y 881, 893 (1998) (arguing that the court should have used the *Rooker-Feldman* doctrine, to which a public interest exception would have been inapplicable).

13 *See* Williamson B.C. Chang, *Rediscovering the* Rooker *Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337 (1980).

14 The general federal question statute. *See infra* note 26.

15 The statute providing jurisdiction in civil rights cases. *See infra* note 26.

16 Wright, Miller, and Cooper observe that "no substantial harm seems to have been done by the jurisdictional cases" but nevertheless finds the jurisdictional approach "unnecessary and potentially mischievous." 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4469 at 665–66, 668 (1981).

17 *See* David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 321–25 (1978).

18 *See* Chang, *supra* note 13, at 1354.

ing the doctrine's jurisdictional pedigree. My thesis is that the *Rooker-Feldman* doctrine can claim jurisdictional status only in the very narrow situations in which litigants ask the federal courts to rehear issues identical to those on which they have already obtained state court decisions or, in other words, those situations in which an appeal would lie.[19]

II. *ROOKER FELDMAN*'S JURISDICTIONAL STATUS: JUDICIAL AND SCHOLARLY REASONING

Rooker v. Fidelity Trust[20] stood for the narrow and uncontroversial principle that a federal district court is not the proper place for parties to appeal issues actually decided against them in state court. The case dealt with a circuit court judgment from the state of Indiana, which was affirmed by the state's supreme court after a full hearing. The same parties then appeared in federal district court, where the unsuccessful state court litigant argued that the judgment violated the Fourteenth Amendment because it gave effect to an unconstitutional statute and conflicted with prior state case law. The court dismissed for lack of jurisdiction, and the Supreme Court upheld the dismissal, stating:

> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.[21]

Rooker, then, held only that federal district courts cannot review a case already decided by the state's highest court, since only the United States Supreme Court has federal appellate jurisdiction over such

---

19 Jack Beermann appropriately inquires why I would advocate maintaining the doctrine at all, even in this narrow form, since all of its legitimate functions can be better served by preclusion doctrines. *See* Jack M. Beermann, *Comments on* Rooker-Feldman *or Let State Law Be Our Guide*, 74 NOTRE DAME L. REV. 1209 (1999). To clarify, I do not advocate maintaining the doctrine. I agree with Beermann's conclusion that it is superfluous, and, as I argue herein, I think it is also harmful to the extent that it does anything more than bar suits that are facially styled as appeals. As to that very limited set of federal suits, I maintain only that the doctrine does no harm and states a rather obvious principle of nonappealability. However, I have no stake in winning the argument that *Rooker-Feldman* should be maintained for those suits. I'd prefer to see the federal courts adopt Beermann's argument, and jettison the doctrine entirely. However, I am not hopeful.

20 263 U.S. 413 (1923).

21 *Id.* at 416 (citations omitted).

claims.[22] The decision was cited sporadically in the following years, and was often mentioned interchangeably with res judicata.[23] Then Williamson B.C. Chang wrote an article criticizing post-*Rooker* courts for interpreting the case too narrowly.[24] Chang argued that *Rooker* was jurisdictionally based and could therefore be used more effectively than preclusion to create exceptions to § 1983. His argument proved influential.[25]

According to Chang, *Rooker* had three rationales, two statutory and one prudential. The statutory rationales arise from the grants of jurisdiction to the Supreme Court and the federal district courts. 28 U.S.C. § 1257[26] grants the Supreme Court exclusive jurisdiction to review the judgments of the highest state courts. By inference, no other court, including a federal district court, has the power to do so. Nor has Congress given the lower federal courts power to review state court judgments. 28 U.S.C. § 1331[27] grants the federal district courts only original jurisdiction. This limitation, says Chang, is an obvious corollary of the grant to the Supreme Court of exclusive power to review state court judgments. "The term 'original' . . . clearly negates, as a matter of statutory construction, any implied 'appellate' jurisdiction" of the federal district courts.[28] In addition to these statutory foundations for the doctrine, Chang presents a third nonstatutory ra-

22 *See also Developments in the Law—§ 1983 and Federalism*, 90 HARV. L. REV. 1133, 1334 n.14 (1977) (noting that dismissal under *Rooker* is inappropriate unless it appeared on the face of the complaint that plaintiff sought appellate review of a state court judgment).

23 *See* Thompson, *supra* note 4, at 863–71.

24 *See* Chang, *supra* note 13.

25 Indeed, Chang's arguments may have proven influential in ways he did not intend. It is important to note that Chang wanted to use *Rooker* to accomplish some specific objectives that were later accomplished through other, nonjurisdictional means. At the time of the article, it appeared to him that courts might permit a blanket § 1983 exception to res judicata. He wanted to see both *Rooker* and res judicata principles merged into one doctrine that would allow preclusion of such claims. His article predated developments in preclusion law itself, and also, inter alia, *Allen v. McCurry*, 449 U.S. 90 (1980), *Migra v. Warren*, 465 U.S. 75 (1984), and the many extensions of the *Younger* doctrine. These decisions more than meet the objectives Chang argued the *Rooker-Feldman* doctrine ought to accomplish.

26 And its precursor, Judicial Code § 238, cited in *Rooker*. *See Rooker*, 263 U.S. at 415.

27 Section 1331 is the general federal question statute. Section 1331's utility was limited by its jurisdictional amount requirements, which were finally eliminated in 1980. Section 1343 was passed concurrently with § 1983 as its jurisdictional counterpart, and the jurisdictional statute tracks the language of the remedial one. Section 1343 was an important vehicle until § 1331 was amended in 1980, since it had no jurisdictional amount requirement.

28 Chang, *supra* note 13, at 1349.

tionale: system consistency. Trial courts should not be able to annul each others' judgments on the merits.[29]

Two years later, the Court decided *District of Columbia Court of Appeals v. Feldman*.[30] In that case, the plaintiffs sought waivers of the District's requirement that, in order for a member of the bar of another state to waive in to the District of Columbia bar, he must have graduated from an accredited law school. When the D.C. Court of Appeals[31] denied their petitions, they alleged in federal district court that refusal to waive the rule violated their constitutional and federal statutory rights. The Supreme Court dismissed the plaintiffs' claims that their petitions had been wrongly denied, citing a lack of subject matter jurisdiction. It held that the D.C. Court of Appeals had already adjudicated plaintiffs' claims on the merits, and therefore a federal district court determination of the same issues would amount to an appeal.

Thus, *Feldman* resuscitated *Rooker*.[32] More significantly, it expanded *Rooker*'s rather innocuous principle that lower federal courts have no appellate jurisdiction over state supreme court decisions. It extended the principle to many situations in which a litigant seeks to raise a claim in federal court that had been raised but not explicitly decided in state court.[33] It also engendered questions about whether the principle extended to issues that had not been raised in state court, but could have been, or even to parties not present in state court. To aid the federal courts in making decisions of a jurisdictional magnitude on these issues, it rather cursorily made two rules of applicability which have since sorely perplexed lower courts: the distinction between judicial and nonjudicial acts, and the extension to issues that were inextricably intertwined with those decided in state court.

---

29 *See id.*

30 460 U.S. 462 (1983).

31 This court is treated as the highest state court of the District under 28 U.S.C. § 1257.

32 Just prior to the *Feldman* decision, the Fifth Circuit had come close to repudiating the doctrine entirely. *See* Thompson, *supra* note 4, at 870–71.

33 *Rooker* barred a federal action "[i]f the constitutional questions stated in the bill actually arose in the [state] cause." *Rooker*, 263 U.S. at 415. In *Feldman*, the plaintiffs raised several statutory and constitutional arguments, none of which were addressed in the Court of Appeals' per curiam opinion. The Supreme Court held that the Court of Appeals had determined as a legal matter that the plaintiffs were not entitled to sit for the bar, and that this question could not be relitigated in federal court. *See Feldman*, 460 U.S. at 480–82.

A. Judicial Acts Requirement

Though it rejected the federal challenge to the plaintiffs' own denial of admission to the D.C. bar, the Supreme Court permitted the lower federal court to consider the plaintiffs' general challenges to the constitutionality of the bar admission rules. *Feldman* held:

> Challenges to the constitutionality of state bar rules . . . do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the district court is not reviewing a state-court judicial decision. In this regard, 28 U.S.C. § 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting . . . district court review of final state-court judgments are not implicated. . . . [United States district courts] do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court. [Citing 28 U.S.C. § 1257].[34]

The Court reasoned that 28 U.S.C. § 1257 stands for the proposition that only the Supreme Court (and by implication not the lower federal courts) can review state court decisions. When a party seeks review of a rule that is not a state *court* decision, but rather a legislative or administrative decision, the policies underlying the Supreme Court's exclusive appellate jurisdiction are not implicated. Thus, to the extent the D.C. Court of Appeals acted administratively in promulgating general bar admission standards, its actions were nonjudicial and did not need to be "appealed" through the state court system. That is, a rule promulgated by a nonjudicial state body can be challenged in federal court—or at least will not be barred by the *Rooker-Feldman* doctrine. It thus becomes necessary to determine what constitutes a judicial body. In the case of an institution like the D.C. Court of Appeals, which wears judicial and ministerial hats, the identification is not always obvious. The Court offered the following language to aid in line drawing:

> The . . . Court of Appeals did not "look to the future and change existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." . . . Instead, the proceedings . . . involved a "judicial inquiry" in which the court was called upon to investigate, declare, and enforce "liabilities as they

34 *Feldman*, 460 U.S. at 486.

> [stood] on present or past facts and under laws supposed already to exist."[35]

However, once the state court, in its judicial capacity, determines the legality of the legislative or administrative rule, that state court decision is considered judicial in nature and cannot be appealed to the federal district courts. Thus, if the D.C. Court of Appeals had actually decided the merits of Feldman's general challenge to the D.C. bar admission rules, the *Rooker-Feldman* doctrine would have barred federal relitigation of that decision as an appeal from a state judicial determination.[36]

B. Inextricably Intertwined Requirement

But what of claims that were not explicitly mentioned in the state court's judicial opinion? *Feldman* extended *Rooker* by barring reconsideration of claims that were implicitly decided, as well. *Feldman*'s second rule of applicability was the "inextricably intertwined" test, which Justice Brennan introduced in a footnote. He explained that:

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.[37]

Unfortunately, nothing in *Feldman* explains the rationale for the language or gives any indication of its proper scope.

C. Federalism

Thus far, we have established that the *Rooker-Feldman* doctrine is purportedly based on interpretation of two jurisdictional statutes: 28 U.S.C. § 1257 and § 1331. Yet it is often referred to as a decision about federalism.[38] Is this merely a reference to the purposes of the jurisdictional statutes, or a suggestion that the doctrine also has a non-

---

35 *Id.* at 479 (citations omitted).

36 As Thompson points out, this caveat should apply only to issues that were raised or inextricably intertwined with issues actually decided in state court, and not to issues that merely could have been raised, since the latter are not in a position to be appealed. In Feldman's case, the plaintiff could have raised the general challenge to the bar rules in state court but did not do so, and the Supreme Court allowed the challenge to go forward nevertheless. *See* Thompson, *supra* note 4, at 876–77.

37 *Feldman*, 460 U.S. at 483–84 n.16.

38 *See, e.g.*, Powell v. Powell, 80 F.3d 464 (11th Cir. 1996); Chang, *supra* note 13, at 1377; Sherry, *supra* note 2.

statutory, prudential source? Professor Chang argued, shortly before the decision in *Feldman*, that the nonstatutory basis of the doctrine was system consistency. As he rather awkwardly put it, "if trial courts could readily annul the judgments of each other on the merits, the prerequisite of finality in the judicial system would be destroyed."[39] Of course, this argument applies equally to res judicata, and as stated has no intersystemic component.[40] Chang immediately went on to say that the lower federal courts cannot enlarge their jurisdiction and the Supreme Court cannot grant its exclusive jurisdiction to the lower federal courts,[41] but this is simply a repetition of the statutory arguments he made earlier. Thus, when Chang refers to the doctrine as an "obligatory, statutorily-based expression of federalism,"[42] he appears to mean that by maintaining adherence to 28 U.S.C. § 1257 and § 1331, the doctrine ensures that the federal and state systems remain sovereign, with the Supreme Court the sole federal court with the power to rule on federal questions raised in either forum.[43]

The *Feldman* case has very little to say about federalism or prudential concerns. It talks mainly about the lack of subject matter jurisdiction. The exceptions occur in the footnote referred to earlier, which mentions two concerns. The first, widely ignored in subsequent cases, might have suggested that the narrow context in which the case arose was important. Justice Brennan noted that "it is important to note in the context of this case the strength of the state interest in regulating the state bar."[44] The note also contains language that, though in context directed at the Supreme Court's certiorari jurisdiction, has been widely cited outside that context:

> By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court. This result is eminently defensible on policy grounds. *We*

---

39 Chang, *supra* note 13, at 1350.

40 Wright, Miller, and Cooper note that its logical corollary would be "that as between two federal district courts res judicata is a matter of jurisdiction, since exclusive jurisdiction for appellate review lies in the courts of appeals." WRIGHT ET AL., *supra* note 15, § 4469, at 666.

41 *See* Chang, *supra* note 13, at 1350.

42 *Id.* at 1341.

43 Currie suspects that:

> [T]he Supreme Court was chosen to review state court judgments because only it had sufficient dignity to make federal review of state courts reasonably palatable; that the highest-state-court requirement was designed to preclude federal interference unless and until state courts had had a full opportunity to avoid that clash . . . .

Currie, *supra* note 17, at 323.

44 *Feldman*, 460 U.S. at 484 n.16.

> *have noted the competence of state courts to adjudicate federal constitutional claims.*[45]

This language is often cited in *Rooker-Feldman* cases for the general proposition of federal-state court parity.[46] Though it is not at all clear that *Feldman* itself meant federalism to play any role beyond that played by the jurisdictional statutes, federalism has evolved into an additional, if amorphously defined, makeweight in the argument for barring federal jurisdiction.

In sum, lower courts presented with the newly minted *Rooker-Feldman* doctrine were handed a very powerful weapon of forum reallocation, and given very little guidance for using it. The jurisdictional nature of the doctrine means that courts either find it highly inflexible, or are readily able to claim inflexibility when they desire to do so. Courts routinely announce that the doctrine is mandatory and leaves them no choice but to dismiss.[47] This means that the doctrine can be claimed to trump all sorts of other policies, like the importance of a federal forum in constitutional cases. It is possible to isolate many specific examples of the consequences of calling *Rooker-Feldman* a jurisdictional doctrine. The Seventh Circuit noted that unlike res judicata, *Rooker-Feldman* contains no limitation in cases in which the federal plaintiff had no adequate opportunity to address the claim in the state action,[48] and the Eighth Circuit noted that the doctrine contains no procedural due process exception.[49] Similarly, the Third Circuit assumed that *Rooker-Feldman* precluded federal review of a decision by a state court to put one of its own judges on senior status despite his constitutional objections. It noted that while a state court decision on the legality of its own actions might be held as too biased to justify abstention, it seemed to comport with *Rooker-Feldman*.[50] In the Ninth Circuit, in a major challenge to Proposition 140 (imposing term limits on certain officeholders), the federal court held it had jurisdiction pursuant to California's public interest exception to pre-

45 *Id.* (emphasis added).

46 *See, e.g.*, Kirby v. City of Philadelphia, 905 F. Supp. 222, 226 n.6 (E.D. Pa. 1995).

47 *See, e.g.*, Goetzman v. Agribank, FCB, 91 F.3d 1173 (8th Cir. 1996); GASH Assocs. v. Village of Rosemont, 995 F.2d 726, 728 (7th Cir. 1993).

48 *See* Gary v. Geils, 82 F.3d 1362, 1367 n.8 (7th Cir. 1996). Although other circuits have held that a full and fair hearing is required for *Rooker-Feldman* to apply, *see* Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983), the parameters of this exception to the jurisdictional rule are rarely discussed.

49 *See Goetzman*, 91 F.3d at 1178.

50 *See* Guarino v. Larsen, 11 F.3d 1151, 1159 n.4 (3d Cir. 1993). The court noted that although the state court opinion contained no discussion of the issues, this was not problematic since the opinion barring Feldman from taking the bar contained no discussion either.

clusion doctrines, despite the fact that the state supreme court had decided the same issue in a case involving different parties. Two judges argued that the federal case should have been dismissed under the *Rooker-Feldman* doctrine, which would not have allowed such an exception.[51]

The consequences of *Rooker-Feldman*'s jurisdictional status extend well beyond these specific instances. More basically, the jurisdictional label acts as a powerful trump card and changes, for the worse, the very delicate balance that previously existed between the protection of federal constitutional rights and state autonomy.[52] The elaborate interplay—congressional and judicial—between § 1983 on the one hand and the Full Faith and Credit Act on the other, between nationalist decisions like *Patsy v. Board of Regents*[53] and *Mitchum v. Foster*[54] on the one hand, and federalist decisions like *Allen v. McCurry*[55] and *Younger v. Harris*[56] on the other,[57] is an interplay of nonjurisdictional statutes and judicial interpretations. *Rooker-Feldman*'s introduction into the mix has the potential to greatly weaken § 1983 and therefore to hobble, without adequate justification, the federal protection of federal constitutional rights.

The consequences of the skewed balance are seen not just in major federal court of appeals decisions which attempt, albeit with difficulty, to reason through the doctrine's requisites. Federal district courts, and even courts of appeal, are using the doctrine to assert, in Robert Cover's memorable phrase, "jurisdictional helplessness."[58] In a recent period of nearly three years, two-thirds of the thirty-nine Seventh Circuit Court of Appeals decisions resting on the *Rooker-Feldman*

51 *See* Bates v. Jones, 131 F.3d 843, 855–59 (9th Cir. 1997) (Rymer, J., concurring); *see also* Snider, *supra* note 12.

52 Ironically, though *Rooker-Feldman* undercuts federal supervision of state court enforcement of federal law, it simultaneously, as Beermann points out, strikes a blow *against* state autonomy, to the extent it insists on the use of federal standards to determine the effect of state decisions. *See* Beermann, *supra* note 19, at 1227–33.

53 457 U.S. 496 (1982) (holding that plaintiffs need not exhaust state remedies before filing a § 1983 suit in federal court).

54 407 U.S. 225 (1972) (holding § 1983 is an expressly authorized exception to the Anti-Injunction Act).

55 449 U.S. 90 (1980) (holding that a state court decision on a constitutional issue will preclude federal judicial consideration of that issue, assuming a full and fair state hearing).

56 401 U.S. 37 (1971) (holding that federal injunctions against pending state criminal proceedings are barred on prudential grounds).

57 *See* Thompson, *supra* note 4, at 917.

58 ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 236 (1975).

doctrine were one or two page unpublished dispositions. Many of these dispositions contain little more than boilerplate assertions that federal courts have no jurisdiction to review or modify state court judgments, that a dissatisfied litigant may not seek reversal of a state court judgment simply by casting his complaint in the form of a civil rights action, and that "that in essence is what . . . [the plaintiff] has done here."[59]

As Justice Stevens argued in his lone dissent in *Feldman*, however, it isn't at all clear *why* this doctrine should be termed jurisdictional. He pointed out that federal district courts do have original jurisdiction over federal question suits and are authorized to entertain collateral attacks upon the unconstitutional application of state rules. He stated succinctly that "[t]he Court's opinion fails to distinguish between two concepts: appellate review and collateral attack."[60] I believe he was correct in his conclusion that there may be many reasons to deny access to the federal courts for such collateral attacks, but that these reasons are simply not of jurisdictional magnitude. Moreover, the so-called jurisdictional mandate of *Rooker-Feldman* conflicts with other jurisdictional mandates—those of 28 U.S.C. § 1331 and § 1343,[61] which reflect a congressional judgment that state court vehicles for the vindication of federal rights and interests are inadequate.[62] The *Rooker-Feldman* doctrine is a dangerous combination of the mandatory inflexibility that comes with being billed as jurisdictional and the tremendous flexibility inherent in interpreting its applicability. Most dangerous, without a coherent theory for why, when, and how this blunderbuss doctrine is jurisdictional, it is impossible to make, with any semblance of fairness, system consistency, or credibility, the interpretive decisions required to apply it.

---

59 Berntson v. Indiana Div. of Family and Children, No. 98-1024, 1998 WL 567951, at *1 (7th Cir. Aug. 18, 1998). *See also* Kren v. City of Springfield, 142 F.3d 440 (7th Cir. 1998).

60 *Feldman*, 460 U.S. at 490 (Stevens, J., dissenting).

61 Beermann's response to this argument is extremely well taken. I am particularly grateful for his insight that § 1343 provides the much stronger argument, since *Rooker-Feldman* is styled only as a limitation flowing from § 1331. As to his argument that § 1331 cannot be used to argue against a doctrine which is itself premised on § 1331, he is correct that we are essentially left to arguments about the proper reach and interpretation of the statute. One such argument is that *Rooker-Feldman*'s claim to be linked to § 1331 is based solely on negative inferences, not on any language or legislative history in the statute itself, whereas § 1331 is a sweeping *affirmative* grant of jurisdiction, based on congressional intent to alter the federal/state balance in a way distinctly contrary to the effects of *Rooker-Feldman*. *See* Beermann, *supra* note 19, at 1227–33.

62 *See* Currie, *supra* note 17, at 320.

III. EXAMINING THE *ROOKER-FELDMAN* DOCTRINE'S CLAIMS OF JURISDICTIONAL STATUS

Rooker-Feldman's jurisdictional pedigree is said to rest on jurisdictional statutes—28 U.S.C. § 1331 and § 1257—and on its advancement of the policies of federalism. No commentator or court has claimed that the doctrine has constitutional status under Article III.[63] Before turning to an evaluation of the doctrine's claimed statutory and policy bases, I want to briefly consider whether it advances or inhibits Article III's jurisdictional aims.

To the extent *Rooker-Feldman* funnels the federal questions raised in state cases to the United States Supreme Court, it arguably advances the interest in a uniform interpretation of federal law. Unfortunately, the Supreme Court so rarely grants certiorari that this notion of uniformity is more aspirational than actual, but permitting the lower federal courts to review state court resolution of federal questions wouldn't significantly advance the uniformity goal either.[64] But what of the other values advanced by Article III jurisdiction, specifically the values that attach to the use of the federal forum for resolution of federal claims? These are rarely mentioned in discussions of the doctrine. Article III courts have attributes that set them apart from state courts—the life tenure and salary protection that help insulate federal judges from majoritarian pressures and assist them in enforcing unpopular rights. It is not necessary to revive the endless parity debate in order to conclude that the Constitution made federal courts tribunals of limited jurisdiction, with certain characteristics that would enable them to perform their special role. *Rooker-Feldman* juris-

63 Thus there seems to be no jurisdictional bar to the ability of Congress to give the lower federal courts appellate jurisdiction over state court claims. This is one way of characterizing what it did with habeas jurisdiction. *See* 28 U.S.C. § 2254(d) (1994); James S. Liebman, *Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2008 n.46 (1992); *see also* Ritter v. Ross, 992 F.2d 750, 753 (7th Cir. 1993). Alternatively, habeas is often characterized as an original civil action distinct from the state criminal action. *See* HART & WECHSLER, *supra* note 4, at 1357–58.

64 It would provide one more opportunity for a grant of certiorari. Some jurists and commentators seem to suggest that having a federal standard for determining whether the federal suit is barred, rather than looking to state law as preclusion demands, is itself a means of advancing uniformity. *See, e.g.*, Currie, *supra* note 17, at 324. But given the lack of Supreme Court guidance on the subject, we currently have multiple federal court decisions with no uniformity and very little articulation. If the argument is that lower federal court determinations of federal law themselves advance uniformity, this would seem to support the general proposition that federal courts should be determining the substantive federal questions themselves rather than deferring to state court decisions on federal law.

prudence, for all its discussion of comity, federalism, and the independence of the sovereigns, by and large fails to acknowledge that the possibility that the federal courts might decide a federal issue differently from the state courts is not necessarily an affront to federalism. Rather, it may be consistent with the intent of Article III.[65]

Congress has the responsibility for determining the precise contours of federal jurisdiction and *Rooker-Feldman* is premised on the notion that Congress has defined those contours, through 28 U.S.C. § 1257 and § 1331, to preclude lower federal courts from hearing appeals from state court decisions.[66] The next step, then, is to examine these statutes and assess whether this premise bears scrutiny.

28 U.S.C. § 1257 provides that the Supreme Court may review judgments or decrees rendered by the "highest state court in which a decision could be had," when a federal question is raised therein. This requirement is directed at ensuring that state courts have the opportunity to fully and completely adjudicate federal issues without premature federal interference.[67] This is in part a concern for developing an adequate factual record, in part a desire to permit state courts to find narrowing constructions or, in general, have the first opportunity to consider a state statute's constitutionality,[68] and in part a means of ensuring that the state processes have the full opportunity to run their course.[69]

Section 1257 itself does not directly speak to the issue of whether a lower federal court can review a state court claim.[70] The bar against federal jurisdiction is created through what one commentator calls

---

65 *See* Susan Bandes, Monell, Parratt, Daniels *and* Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 120–27 (1986) [hereinafter Bandes, *Unauthorized Act*]; Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 281–92 (1990) [hereinafter Bandes, *The Idea of a Case*].

66 There is also the question of whether the power of Congress is plenary, for example whether Congress could create a doctrine like *Rooker-Feldman* if it would deprive plaintiffs of any forum in which to litigate due process or equal protection claims. Whether there are such limitations on the power of Congress to shape the lower federal courts' jurisdiction is a question that has spawned a rich literature. *See* Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 300 n.38 (1995) (citing sources). See also the recent symposium in Issue 7 of 86 GEORGETOWN L.J. (1998).

67 *See* Cardinale v. Louisiana, 394 U.S. 437 (1969).

68 *See id.*

69 *See* Currie, *supra* note 17, at 323.

70 Moreover, in the direct appeal context § 1257's finality requirement has been interpreted with a fair degree of flexibility toward countervailing concerns. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); HART & WECHSLER, *supra* note 4, at 636–41 (discussing the exceptions to the finality requirement).

the "two negative inferences."[71] The first is implied from § 1257: that because Congress restricted the Supreme Court to hearing appeals from the highest state court in order to allow state courts to complete their processes, lower federal courts are also barred from hearing claims decided by the lower state courts. The second negative inference, arising from 28 U.S.C. § 1331, completes the picture: even once state processes have run their course, the Supreme Court has exclusive federal jurisdiction to review claims decided in state court. Lower federal courts, by inference, have no such jurisdiction.[72] Thus, the *Rooker-Feldman* doctrine can be said to rest on the requisites of the jurisdictional statutes only if these inferences are correct.[73]

To begin, it is not clear why § 1257 should apply to preclude federal review of the decisions of lower state courts. As one commentator noted, in light of the highest state court requirement, *Rooker-Feldman*'s "preclusive effect would seem to be activated only once the state's highest court has rendered some type of decision."[74] But the doctrine has generally been read more broadly to impose a requirement that a lower state court decision be appealed through the state system and to the Supreme Court—in short, an exhaustion requirement.[75] As I will discuss below, this extension is problematic in light of the courts' difficulty in distinguishing an appeal from an original action under the *Rooker-Feldman* criteria, since the exhaustion requirement, when im-

71 *See* Smith, *supra* note 4, at 641.

72 *See id.*; Port Auth. PBA v. Port Auth. of N.Y. & N.J., 973 F.2d 169, 177 (3d Cir. 1992).

73 Moreover, although the *Rooker-Feldman* doctrine is said to rest on § 1257's jurisdictional requirement that the Supreme Court cannot hear federal claims not raised below, it is not settled whether this requirement is itself jurisdictional or prudential. *See* HART & WECHSLER, *supra* note 4, at 567 (citing Yee v. City of Escondido, 503 U.S. 519, 533 (1992)).

74 Smith, *supra* note 4, at 640.

75 *See, e.g., Port Authority*, 973 F.2d at 177; *see also* Garry v. Geils, 82 F.2d 1362, 1368 (7th Cir. 1996) (holding that if plaintiffs desired to challenge condemnation action as unconstitutional, they should have done so through the Illinois condemnation process and ultimately to the U.S. Supreme Court). The *Feldman* court suggested that this requirement prevents litigants from circumventing the dictates of § 1257 simply by failing to raise their claims in state court. *See Feldman*, 460 U.S. at 482 n.16; *see also Rooker*, 263 U.S. at 416; Currie, *supra* note 17, at 323 (arguing that district court relief would undermine § 1257's requirement that an attack upon a state judgment be timely filed). But this argument begs the question of why an exhaustion requirement should be imposed in a situation in which a federal plaintiff would otherwise have concurrent federal jurisdiction over federal claims.

posed to preclude federal district courts from hearing § 1983 cases, directly conflicts with that statute's nonexhaustion requirement.[76]

In addition, it is not clear why a jurisdictional rule that by its terms is directed at the United States Supreme Court's jurisdiction should be transposed to regulate the federal district courts. Section 1257 is directed at ensuring that state courts have the opportunity to fully and completely adjudicate federal issues without premature federal interference. Yet the federal district courts possess attributes and duties different from those of the United States Supreme Court. The Supreme Court, in the exercise of its appellate jurisdiction, sits to correct errors below and has no fact-finding capabilities. The federal district courts possess original jurisdiction over federal claims and do have independent fact-finding capabilities. Thus, the need for a fully developed record is not relevant to the federal district courts' jurisdiction. It would be relevant if they were hearing appeals, but of course they are not permitted to hear appeals, only original actions.

It also appears that the Supreme Court in the direct appeal context has a narrower interpretation of what constitutes an original action than it often does in the *Rooker-Feldman* context. It is telling to examine some of the instances in which the Supreme Court, in interpreting § 1257, has refused to hear claims that it deemed to be separate from those raised in state court. For example, in *Yee v. City of Escondido*,[77] the Court deemed that an argument that a rent control ordinance constituted a regulatory taking was separate from a claim that the ordinance violated substantive due process. Likewise, in *Bailey v. Anderson*,[78] the Court ruled that a state court challenge to the denial of interest in a condemnation action could not be converted into a federal constitutional question under the Just Compensation Clause. Yet in the *Rooker-Feldman* context, federal constitutional challenges to condemnation, foreclosure, or other state restrictions on property are routinely dismissed as inextricably intertwined with the state court decisions, on the ground that a favorable decision on the constitutional issue would negate the state court judgment.[79]

Moreover, even accepting the rather elaborate double negative inference, it still leads only to the conclusion that the lower federal courts may not rehear claims that were adjudicated in state court. This proposition comports with the common understanding of the

76 *See* Patsy v. Board of Regents, 457 U.S. 496 (1982). More accurately, the bar on federal jurisdiction cannot be called an exhaustion requirement, since it permanently precludes federal consideration of the issue.

77 503 U.S. 519 (1992).

78 326 U.S. 203 (1945).

79 *See, e.g., Garry*, 82 F.3d at 1362; Ritter v. Ross, 992 F.2d 750 (7th Cir. 1993).

term "appeal." *Rooker* itself was consistent with this narrow understanding but beginning with *Feldman*, the doctrine has been used to preclude a wide array of claims that differ from claims determined by state courts. *Feldman* permitted preclusion of issues not actually decided, and lower courts also preclude issues that were not raised at all;[80] some have even precluded issues by parties not part of the state court proceeding.[81] These extensions do not comport with the requisites of an appeal.

There is a certain cynical spin put on these extensions by the lower courts, which often refer to a disappointed state plaintiff as filing a federal suit to get around his adverse state judgment.[82] No doubt this occurs, but there is a troubling tone to much of the *Rooker-Feldman* jurisprudence: it contains an implicit assumption that a federal suit following a state suit must be a less-than-ethical attempt to manufacture federal jurisdiction. Recall Justice Stevens' point in his *Feldman* dissent. He argued that these are all cases in which original jurisdiction does lie with the lower federal courts. The initial presumption should be in favor of federal court access for federal claims. If we accept the double negative inference, the federal courts are divested of their jurisdiction only if the case comes to them as an appeal, rather than a separate and independent proceeding. Thus, *Rooker-Feldman*'s jurisdictional status rests entirely on the courts' ability to sort the "appeals from state court judgments" from the independent, original proceedings, a distinction that often seems to rest on the federal district court's reaction to the way the federal complaint is drafted.[83]

Let me be clear on one point: the fact that the distinction between unauthorized appeals and authorized original actions is not a bright-line rule is not in itself an argument against the doctrine's jurisdictional status. I would argue that no jurisdictional doctrine is self-defining—all doctrines leave room for judicial interpretation. But there are particular problems with this doctrine and the way it has developed. Courts have too often used the jurisdictional stature of the doctrine as a convenient way to avoid reasoning through the policies underlying it. Just as the question of what is jurisdictional is not

80 *See, e.g.*, Kirby v. City of Philadelphia, 905 F. Supp. 222 (E.D. Pa. 1995); Powell v. Powell, 80 F.3d 464 (11th Cir. 1996).

81 *See* Sherry, *supra* note 2, at 1112 & n.108. Sherry points out that several lower courts have precluded nonparty suits even after the Supreme Court's decision in *Johnson v. DeGrandy*, 512 U.S. 997 (1994), which arguably held the practice impermissible.

82 *See, e.g.*, GASH Assocs. v. Village of Rosemont, 995 F.2d 726, 727 (7th Cir. 1993); Lynk v. LaPorte Superior Court, 789 F.2d 554, 563 (7th Cir. 1986).

83 Thompson, *supra* note 4, at 882.

self-defining, the jurisdictional label cannot be substituted for a reasoned inquiry into whether a doctrine's scope is properly tailored to the purposes it is meant to serve. Let's now turn to a consideration of the purposes that both the *Rooker-Feldman* doctrine and its claimed jurisdictional bases (§ 1331 and § 1257) are meant to serve.

The question of what policies § 1257 advances in the *Rooker-Feldman* context is often answered in general statements about the importance of preserving the autonomy of both sovereigns and preventing undue incursions of one upon the other.[84] What does this mean in practice? What particular jurisdictional policies are at risk when a federal district court reviews a state court decision? The bar on appeals might advance goals that are not peculiar to dual sovereignties. It might simply be a means of regulating claim splitting where it encroaches on values like system consistency, fairness to litigants, preservation of judicial resources, and finality.[85] These interests could be adequately served by nonjurisdictional preclusion doctrines.

But much of the language of *Rooker-Feldman* is imbued with a rather vaguely expressed concern for federalism. It is important to speak more precisely about what such a concern entails in order to determine what effect it should have on the doctrine's proper scope. As I will illustrate in the following discussion of the "judicial in nature" requirement, the failure of the courts to face the question of what interests are at stake helps explain the wild divergence in scope that various districts and circuits have given the doctrine.

A. Judicial in Nature

Feldman almost offhandedly gave federal courts the task of making several distinctions of purportedly jurisdictional magnitude. First, because the doctrine is based largely on § 1257, which gives the Supreme Court exclusive federal appellate jurisdiction over state judicial decisions, the federal district court needs to determine whether it is being asked to review a state judicial decision. *Feldman* reasoned that the policies animating § 1257 are not implicated by review of rules that were not judicially promulgated, such as statutes adopted by legislatures or regulations adopted by administrative tribunals. But in *Feldman* itself the Court was faced, in part, with an administrative rule promulgated by the D.C. Court of Appeals, in its administrative capacity.[86] Thus, in a case like *Feldman* in which a single tribunal can wear

84 *See, e.g.*, Smith, *supra* note 4, at 636.

85 *See* Chang, *supra* note 13, at 1350.

86 *See* Friedman, *supra* note 7, at 1167–73 (discussing the peculiar problems with attorney discipline cases).

more than one hat, the identity of the tribunal may not be dispositive. Courts must look to the type of authority that a tribunal is exercising in the particular case.

Unfortunately, the *Feldman* Court, though it claimed to key the "judicial in nature" inquiry to the policies implicated by § 1257, did not identify the particular policies at risk. In a footnote, the Court mentioned "the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments" and the opportunity of the state court to give the statute a saving construction.[87] Such considerations may justify an exhaustion requirement, but not the total preclusion *Rooker-Feldman* requires. Indeed, these are the same concerns animating the nonjurisdictional doctrine of *Pullman* abstention, which, unlike the *Rooker-Feldman* doctrine, permits state court litigants to reserve their federal claims.[88]

Many courts analogize *Rooker-Feldman* to *Younger v. Harris*.[89] Lower courts justify the extension of the *Younger* principle from a prohibition on interference with ongoing state actions to a prohibition on reconsidering completed state actions by reasoning that "if we assume the state court will get it right in an ongoing proceeding, we should also assume that it did get it right when the proceeding is complete."[90] This reasoning reads out *Younger*'s disinclination to thwart the state judicial machinery when it is in motion, in favor of a more broadly stated respect for the competence of state courts. It ignores the fact that the *Younger* doctrine is a prudential exception to a jurisdictional doctrine (with exceptions of its own) rather than a distinct jurisdictional doctrine.

Even when the state's judicial machinery is not in motion, nonintervention could be premised on the desire to show respect for state courts. But the vagueness of this formulation has been highly problematic. Does it constitute a desire to show respect for state court decisions on particular issues, for state court judgments affecting particular parties, for state court judgments as a more general matter,

---

87 *Feldman*, 460 U.S. at 484 n.16.

88 *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1971); England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964); *Feldman*, 460 U.S. at 480 n.14 (holding the *England* reservation procedure inapplicable in *Rooker-Feldman* cases).

89 401 U.S. 37 (1971).

90 Johnson v. Kansas, 888 F. Supp 1037, 1079 (D. Kan. 1995). *See, e.g.*, Facio v. Jones, 929 F.2d 541, 545 (10th Cir. 1991). *But see* Steffel v. Thompson, 415 U.S. 452, 464 (1974) (holding the *Younger* doctrine inapplicable to federal declaratory actions against threatened state prosecutions, and holding that "lower federal courts are the primary and powerful reliances for vindicating constitutional rights").

or for state substantive legislative priorities?[91] If it is a desire to show respect for state court resolution of particular issues, it would seem to support the rather frightening position taken by Judge Rymer of the Ninth Circuit in her concurrence in *Bates v. Jones*.[92] In this case, Judge Rymer argued that a state decision on the constitutionality of Proposition 140, imposing term limits on certain state officeholders, precluded a federal challenge to the same act even though it was brought by different parties in an entirely different case. Or is nonintervention premised on a desire to show respect for state judgments affecting particular parties,[93] which would preclude using *Rooker-Feldman* to bar challenges by different parties? Or is it based on a desire to show respect for the state court judgments themselves, regardless of what issues were raised or decided in state court?[94] This rationale might even support a result like that in *Kamilewicz*, which barred a federal challenge to a state class action settlement even though the federal suit alleged that the settlement had been obtained through fraud and attorney malpractice.[95] Or, for that matter, is the nonintervention principle a very narrow rule applicable in situations in which the state needs autonomy to protect an important state interest, such as regulating the state bar?[96] These various formulations of the pur-

91 *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 344–45 (2d ed. 1980) (discussing the various possible components of federalism as a ground for deferring to state courts). Professor Currie, for example, argues that an original federal action attacking a state judgment may pose the greatest conflict, since it would permit a new trial rather than confining review to the state record. *See* Currie, *supra* note 17, at 323–24.

92 131 F.3d 843, 855–59 (9th Cir. 1997) (Rymer, J., concurring).

93 *See id.* at 862 (Fletcher, J., concurring in part and dissenting in part).

94 Cases like *Garry v. Geils*, 82 F.3d 1362, 1367 (7th Cir. 1996), and *Ritter v. Ross*, 992 F.2d 750, 750 (7th Cir. 1996), reflect the courts' confusion. These cases state the principle that *Rooker-Feldman* is activated when a federal plaintiff seeks to overturn a state court *judgment*. They attempt to distinguish the situation in which the federal plaintiff is instead complaining of the actions of the opposing *parties* in state court. But as *Garry* recognized, the harm from the opposing party's actions becomes complete only when upheld by the state court. In the absence of an adverse state court judgment upholding the opposing party's conduct, presumably the harm inflicted by the opposing party would generally not continue to be actionable.

95 *See* Kamilewicz v. Bank of Boston, 100 F.3d 1348 (7th Cir. 1996).

96 *See Feldman*, 460 U.S. at 484 n.16; *see also Bates*, 131 F.3d at 863 (Fletcher, J., concurring in part and dissenting in part) (arguing that *Feldman* is an exemplar of a unique class of cases in which the claim of right—denial of admission to the state bar—involved a matter of policy that was under the exclusive control of the court, and therefore every such claimant would be saddled with an unfavorable state court "judgment" (his denial of admission) before ever being able to claim that he had been improperly denied admission).

pose of the jurisdictional limitation lead to sharply different conclusions about its proper scope.

But *Feldman* did not give the lower courts guidance on what policies the doctrine sought to advance. Instead, it offered federal courts a guideline for separating a state court's judicial acts from its nonjudicial acts. Federal courts were given the following task: to decide whether a particular state court decision

> look[ed] to the future and change[d] existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power . . . [or] involved a "judicial inquiry" in which the court was called upon to investigate, declare, and enforce liabilities as they stood on present or past facts and under laws supposed already to exist.[97]

Lower federal courts, unsurprisingly, have had a difficult time distinguishing the general challenge from the particular inquiry, especially since even a general challenge may be barred from federal court if it is inextricably intertwined with a particular inquiry in state court. Ironically, in light of the *Rooker-Feldman* doctrine's stated goal of advancing federalism, federal courts have to delve into the nature and content of particular state court proceedings to decide this question. Because *Rooker-Feldman* is styled as jurisdictional, the federal courts cannot inquire into whether the state proceedings were judicial under state law, but instead must use a uniform federal standard.[98] The results, however, have been far from uniform.

In *Feldman* itself, the Court saw no problem with distinguishing a general constitutional challenge to the state's bar admission rules from a claim that the state had unlawfully denied a particular applicant admission.[99] Sometimes the claims seem to fit neatly into the proper categories. In *Van Harken v. City of Chicago*[100] the Seventh Circuit held that a declaration that the city's parking ticket procedures were constitutionally inadequate was not barred by *Rooker-Feldman* because it did not challenge the result in any particular case; however, a suit seeking refunds of parking fines imposed on the particular plaintiffs would be barred.[101] The *Facio*[102] case discussed by Suzanna

97 *Feldman*, 460 U.S. at 479 (quoting Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908)).

98 *See Garry*, 82 F.3d at 1367 n.8.

99 *See Feldman*, 460 U.S. at 485.

100 103 F.3d 1346 (7th Cir. 1997).

101 If the result of the general challenge would be to give the plaintiff a refund, however, the general challenge would be barred as inextricably intertwined. *See id.* at 1348.

102 Facio v. Jones, 929 F.2d 541 (10th Cir. 1991).

Sherry unwittingly identifies one of the basic problems with this distinction: if the litigant cannot show that he himself will be affected by the outcome of the general challenge, he does not have standing to bring that challenge. If he can show that he will be affected, it may mean that his particular claim is inextricably intertwined with his general challenge.[103] Apparently, the only way out of this nearly perfect Catch-22 is for the plaintiff to allege that upholding the general challenge will not affect his particular claim in this case, but that he is likely to have a similar case in the future.[104]

Thus, courts must determine what harms are likely to recur to the particular plaintiff in order to determine the viability of a general challenge under *Rooker-Feldman.* As similar inquiries in the standing and abstention contexts have illustrated,[105] this is not a bright-line inquiry, but an exploration rife with value-laden assumptions about probability and human behavior. For example, it tends to block challenges to unconstitutional practices of the criminal justice system, given the courts' unwillingness to assume that any particular plaintiff will again violate the law and be subjected to the challenged practices.[106] Moreover, whether a federal plaintiff's legal challenge is seen as particular or general will depend on the court's notoriously elastic view of the claim itself, the substantive rights involved, and even the court's own role.[107] For example, consider the following example

103 This apparently was not a problem in *Feldman* because the Court viewed "inextricably intertwined" as distinct from "could have been raised." Though *Feldman* could have raised the general challenge in state court, it was not intertwined with the particular challenge. Subsequent lower courts have not been as ready to make this distinction.

104 Hart and Wechsler asked, with apparent bemusement, whether *Rooker-Feldman* should govern "as applied" challenges, while res judicata should govern facial challenges? If so, they asked, on what grounds? *See* HART & WECHSLER, *supra* note 4, at 1503.

105 *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that it was unlikely that plaintiff would be subjected to illegal police-administered chokehold again); Wooley v. Maynard, 430 U.S. 705 (1977) (upholding permanent injunction against threat of repeated future prosecutions for obscuring state motto on license plate).

106 *See, e.g., Lyons,* 461 U.S. at 95; O'Shea v. Littleton, 414 U.S. 488 (1974). *But see* Linda R.S. v. Richard D., 410 U.S. 614 (1973) (denying standing to challenge deadbeat dad law on grounds that presence of law and its penalties are unlikely to lead to compliance).

107 I have written about this elasticity in the standing area, for example. There it is particularly problematic to the extent the denial of standing is jurisdictionally rather than prudentially based. *See* Bandes, *The Idea of a Case, supra* note 65. For example, in *Lyons,* it was not clear whether the plaintiff meant to bring a general challenge to an ongoing police practice of choking unresisting suspects or to the fact that it was done to him in particular. In part this was a disagreement about whether the requi-

from the related, though nonjurisdictional, context of *Younger* abstention. In *Gomez v. United States District Court*,[108] the Supreme Court barred the issuance of federal injunctions based on allegations that the manner in which the state of California executed prisoners—lethal gas—violated the Eighth Amendment. The Court refused to permit federal consideration of the issue of the constitutionality of California's means of execution because it held that the argument had been decided by the state court when it upheld the prisoner's conviction.[109] Perhaps the Court meant to say that the claims would be intertwined any time resolution of the federal claim would overturn the petitioner's death sentence. Thus, to gain access to the federal forum, Gomez would have needed to show that he would have been executed despite succeeding on his federal claim.

Although dual sovereignty makes it impossible to avoid questions of congruity between state and federal claims, in the *Rooker-Feldman* context it did seem avoidable. The *Feldman* formulation predicted all the ensuing problems. It seems naive and anachronistic to discuss whether a legal ruling explains facts as they are supposed to exist, or looks to the future. This distinction is not particularly descriptive of the categories of legal rules. If anything, it reflects a peculiarly narrow, private law-based notion of what courts do when they decide cases. All norm articulation affects future litigants in some sense; yet all Article III cases, by definition, affect current litigants—and usually with some citation to precedent. One sympathizes with the Third Circuit judge who found himself having to explain why a state court's novel legal decision can still be adjudicative, and thus barred by *Rooker-Feldman*. He explained: "When a court makes a novel legal decision, it attempts to arrive at that decision by reasoning from existing materials. The court is making an attempt to 'say what the law is.'"[110]

As one court ingeniously discovered, every general challenge can be broken down into individual instances of wrongdoing. In *Johnson v. Kansas*, the plaintiff alleged that the Kansas Supreme Court violated

---

sites of a § 1983 municipal liability claim were met, but in part it was a disagreement about whether Lyons had a judicially cognizable interest in arguing only about his own right not to be choked, or also about the rights of other young African-American men in the Los Angeles area. *See Lyons*, 461 U.S. at 95; Bandes, *The Idea of the Case*, *supra* note 65, at 266.

108 503 U.S. 653 (1992) (per curiam). *See* Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992) (discussing *Gomez*).

109 *See Gomez*, 503 U.S. at 608.

110 Guarino v. Larsen, 11 F.3d 1151, 1157 n.2 (3d Cir. 1993) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

the Americans with Disabilities Act through policies, patterns, and practices that denied admission to applicants with a history of mental illness unless they could prove they had been cured. Though the plaintiff thought he was making a general challenge to the state's method of adjudicating applications, he was told that "each of the state decisions in that alleged pattern or chain was the result of a separate state judicial proceeding adjudicating an individual application that may not be reviewed in this court."[111]

Some courts have tried to identify general challenges based on forms of relief, finding that prospective relief encompassing all similarly situated future plaintiffs does not violate *Rooker-Feldman*,[112] though other courts have viewed such claims more skeptically as attempts to circumvent the doctrine through manipulative pleading.[113]

Unless courts receive more guidance on why it is important to determine whether a proceeding is judicial in nature, we are likely to see more debates like that in *Bates* and more results like the one in *Kamilewicz*. In *Bates*, the Ninth Circuit needed to determine whether the federal district court had jurisdiction over a challenge to Proposition 140 despite the fact that a state court had considered a nearly identical challenge brought by different parties. Judge Rymer was of the opinion that any federal court decision on the constitutionality of the Proposition would put the federal district court on a collision course with the state supreme court.[114] Judge Fletcher correctly pointed out that this formulation would give state courts the power to permanently foreclose review of state statutes in lower federal courts. She argued that the doctrine is instead about the integrity of individual judgments that bind particular parties and should only preclude federal review of such judgments.[115] Judge Rymer's formulation would have devastating consequences for litigant access to federal court and for federal oversight of state court protection of constitutional rights. But without a more nuanced understanding of the evils the doctrine seeks to prevent, it is difficult to assert with conviction that she misinterpreted the *Rooker-Feldman* doctrine. Does the doctrine mean to prevent federal intrusion into states' autonomy to issue

111 Johnson v. Kansas, 888 F. Supp. 1037, 1083–84 (D. Kan. 1995).

112 *See* Kirby v. Philadelphia, 995 F. Supp. 225 (E.D. Pa. 1995).

113 *See* Stern v. Nix, 840 F.2d 208, 212 (3d Cir. 1988) (holding that plaintiff's general challenge was simply a skillful attempt to mask the true purpose of the action).

114 *See* Bates v. Jones, 131 F.3d 843, 856 (9th Cir. 1997) (Rymer, J., concurring).

115 *See id.* at 862–63 (Fletcher, J., concurring in part and dissenting in part).

judgments affecting particular parties or into their autonomy to decide issues of state concern?[116]

Kamilewicz raises another problem with interpreting the reach of the "judicial act" requirement. *Kamilewicz* grew out of a state class action suit. In the federal suit, the class members sued (among other defendants) their state court attorneys for fraud and malpractice. The Seventh Circuit held that a state court postsettlement fairness hearing was a judicial proceeding, and therefore federal claims alleging that the attorneys had obtained the settlement through malpractice and fraudulent misrepresentations to their clients were barred.[117] Judge Easterbrook reasonably suggested that the mere fact that misconduct took place in the context of a judicial proceeding hardly seemed a good reason to insulate it from federal review. He argued that based on this reasoning, if the state court judgment was unreliable because of attorney bungling, the bungler would be able to point to the adverse judgment itself to ward off his client's claims.[118] Or as Judge Posner put it in another case: "Otherwise there would be no federal remedy for a violation of federal rights whenever the violator so far succeeded in corrupting the state judicial process as to obtain a favorable judgment . . . ."[119] But without a theory that explains the importance of the "judicial proceeding" requirement, the outrageous result in *Kamilewicz* could easily be replicated.[120] Taken to the extreme, such an interpretation of § 1257 and its federalism component supports the notion that if a state court decision results from a corrup-

116 *See, e.g.*, Powell v. Powell, 80 F.3d 464, 467 (11th Cir. 1996). The court in *Powell* held that *Rooker-Feldman* applies for reasons that go to the heart of our system of federalism—the dual dignity of state and federal court decisions interpreting federal law. It stated that in our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. *See id.* (citing Lockhart v. Fretwell, 504 U.S. 908 (1992)).

117 Perhaps, as Judge Easterbrook argued in dissent from the denial of rehearing en banc, a settlement followed by a fairness hearing is more like a contract than like litigation. *See* Kamilewicz v. Bank of Boston, 100 F.3d 1348, 1352 (7th Cir. 1996).

118 *See id.* at 1348 (Easterbrook, J., dissenting from denial of rehearing en banc).

119 Nesses v. Shepard, 68 F.3d 1003, 1005 (7th Cir. 1995). Significantly, the Supreme Court has sometimes taken a broader view of its jurisdiction in the direct appeal context. *See* Wood v. Georgia, 450 U.S. 261 (1981). In *Wood*, the Court vacated convictions based on the fact that the litigants had been represented below by attorneys with a potential conflict of interests with possible due process implications. The Court decided the issue although it had not been raised in state court. *See* HART AND WECHSLER, *supra* note 4, at 570.

120 *See* Guarino v. Larsen, 11 F.3d 1151, 1159 n.4 (3d Cir. 1993) (recognizing the problem with permitting a state court to make an unreviewable decision about the legality of its own personnel action, but finding that result consistent with *Feldman*).

tion of the judicial process, the state court is fully capable of cleaning its own house.[121] Or failing that, the Supreme Court is available, theoretically at least, to bring order.[122] Although Sherry treats attorney malpractice as a special problem raised by *Rooker-Feldman*, the problem is more basic than special. Why should federal courts defer to state judicial proceedings? What does 28 U.S.C. § 1257 tell us about why this deference is necessary? Merely pronouncing a state proceeding "judicial in nature" and citing vague policies in favor of deference leaves too much unanswered.

B. Inextricably Intertwined

The second difficulty raised by *Feldman*'s extension of *Rooker* is that it is now necessary to determine not just which claims were decided in state court, but which were inextricably intertwined with those that were decided. As mentioned, *Feldman* itself gives little guidance, mentioning the requirement only briefly in a footnote. Justice Marshall attempted a definition in his *Pennzoil v. Texas*[123] concurrence, saying "a federal claim is inextricably intertwined . . . if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it."[124] Nevertheless, federal courts have found the standard difficult to apply,[125] as even a cursory review of the resulting precedent will reflect.

Most circuits have adopted rules barring suit where a federal judgment would reverse, effectively nullify, or vacate the state court

121 *See* Johnson v. Kansas, 888 F. Supp. 1073, 1085 (D. Kan. 1995). In *Johnson*, the court opined: "That a state's highest court would knowingly violate a federal law and then would actively conceal its violation seems such an unlikely proposition that it hardly warrants discussion, let alone being cause for exercising jurisdiction in the face of the *Rooker-Feldman* doctrine." *Id.*

122 Judge Easterbrook argued that the litigants did not even have an opportunity to raise many of their claims in state court since they were unaware of them. The federal district court addressed that argument by holding that the litigants could bring their new allegations back to state court to obtain relief. *See* Kamilewicz v. Bank of Boston, No. 95C6341, 1995 WL 758422, at *5 (N.D. Ill. Dec. 15, 1995). Many, though not all, federal courts would find the doctrine inapplicable when the federal plaintiff could not have raised the claim in state court, despite the fact that it was intertwined with a claim that was raised. *See* Wood v. Orange County, 715 F.2d 1543 (11th Cir. 1983) (explaining that in such a case there can be no appeal in the state court system, since the claim could not have been raised in state court).

123 481 U.S. 1 (1987).

124 *Id.* at 25 (Marshall, J., concurring).

125 *See, e.g.*, Ritter v. Ross, 992 F.2d 750, 754 (7th Cir. 1993) (holding that no bright line separates federal claims that are intertwined with state court judgments from those that are not); Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1433 (10th Cir. 1984) (expressing the same view).

judgment. But, like the judicial proceeding requirement, the "inextricably intertwined" requirement is not a bright-line rule. It depends largely on the reading of the complaint. To take a prosaic example, consider a couple of the many federal cases seeking to litigate issues arising from state zoning or condemnation decisions. In *Centres v. Town of Brookfield*,[126] the state court upheld the town board's denial of a building permit. The plaintiff brought a takings claim in federal court, which held *Rooker-Feldman* inapplicable, finding that the plaintiff was complaining of an injury at the hands of the defendant rather than at the hands of the state court, and thus his federal claim was not inextricably intertwined with the state court decision.[127] Compare *Garry v. Geils*,[128] in which the state court granted a condemnation order and plaintiffs sued in federal court alleging the order had been politically motivated. The federal suit was held barred by *Rooker-Feldman*. The court reasoned that the retaliation injury only became complete when the state ordered the condemnation, and therefore the harm of which the plaintiff complained was inextricably intertwined with the state court judgment. Is the question whether the state court implicitly decided the federal issue (and that therefore its decision must be respected) or whether the state judgment ought to remain intact in the face of the federal ruling, regardless of what issues were actually decided? Which, if either, of these formulations is consistent with the rationale that federal district courts cannot hear state court appeals? Unfortunately, it appears that such a narrow and defensible rationale was lost when *Rooker* itself was extended beyond reconsideration of the identical case.

There are difficult questions about how broadly to construe the notion that the federal decision cannot nullify the state decision. *Kamilewicz* again provides a worst-case scenario. The Seventh Circuit found that state court approval of a settlement, which included approval of attorney fees, was inextricably intertwined with the questions of whether the attorneys or the bank had committed fraud, malpractice, or breach of fiduciary duty in their representations to the court and the plaintiffs. It reasoned that any federal holding for the plaintiffs would call into question the state court conclusion that the fees were reasonable. It is therefore quite possible for a claim substantially unrelated to those raised in state court to call into question the federal judgment. To bar federal consideration of such claims cuts a sig-

126 148 F.3d 699 (7th Cir. 1998). The federal district court dismissed on the ground that the plaintiff had failed to state a claim on which relief could be granted.

127 *See id.*

128 82 F.3d 1362 (7th Cir. 1996).

nificant swath through lower federal court jurisdiction. It also bears little resemblance to the notion of a direct appeal of issues raised below.

Lower courts applying the *Rooker-Feldman* doctrine, as I mentioned above, often seem to assume a kind of bad faith among would-be federal plaintiffs.[129] Although the federal cases are rife with comments about how jurisdictionally inflexible and mandatory the inquiry must be, these courts lace their determinations with a certain ill-defined version of federalism that weighs heavily against federal jurisdiction. They are apt to look at all sorts of disparate state and federal claims as intertwined and interchangeable and to assume that federal and state courts are also interchangeable. For example, in the *Republic of Paraguay*[130] case discussed by Sherry, in which Paraguay filed a federal suit alleging that the state of Virginia violated certain treaties when it tried and convicted a Paraguayan national, it is not at all clear that the defendant's arguments against the constitutionality of his conviction and sentence were completely congruent with the interests of the republic in maintaining international respect for its treaties, despite the fact that the result of accepting Paraguay's argument would have meant reversal of the defendant's conviction. The facile conflation of state and federal claims is troubling.[131] As the Second Circuit observed in the *Texaco, Inc. v. Pennzoil Co.*[132] case, most § 1983 claims could be raised in a related state proceeding.[133] Most federal claims have some state law analogue, but violations of the federal Constitution are not interchangeable with state wrongs.[134] When federal claims are too easily conflated with state claims, it becomes too easy to assume that the state forum is adequate to address them.

---

129 *See supra* notes 81–82 and accompanying text. In the Northern District of Illinois' opinion in *Kamilewicz*, the court says: "Even though their request for relief is dressed up as damages under RICO, § 1983, or for attorney malpractice, the plaintiffs are asking us to undo what the Alabama court did, and that constitutes a [sic] impermissible collateral attack upon the state court judgment." *Kamilewicz*, 1995 WL 758422, at *5.

130 949 F. Supp. 1269 (E.D. Va. 1996).

131 *See* Aiona v. Judiciary of Haw., 17 F.3d 1244, 1250 n.10 (9th Cir. 1994) (dismissing on *Rooker-Feldman* grounds, and without elaboration, a federal class action suit challenging the administrative procedures used following arrests for driving while intoxicated).

132 784 F.2d 1133, 1144 (2d Cir. 1986).

133 *See id.*

134 *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Harlan, J., concurring); Monroe v. Pape, 365 U.S. 167 (1961); Bandes, *supra* note 66, at 325.

However, what is most troubling is that many dismissals under *Rooker-Feldman* contain no reasoning. For example, in *Davis v. Allen County*,[135] an unpublished disposition, the federal plaintiff, whose parental rights had been terminated in state court, filed a § 1983 suit alleging that the state department of welfare had discriminated against him because of his gender. The Seventh Circuit dismissed the case on *Rooker-Feldman* grounds. Here is the federal court's complete exegesis of the claim:

> Although the equal protection claim is distinct from the state court judgment, it is "inextricably intertwined" with the state court judgment and the district court also[136] lacked jurisdiction over that claim. [Citations omitted.] Because the federal courts do not have jurisdiction over this case, it should have been dismissed for lack of subject matter jurisdiction.[137]

Perhaps the court was correct, but who's to know? Many of the opinions contain little discussion of the respective interests at stake in the state and federal cases. The need to determine whether federal and state claims are congruent arises in many intersystemic contexts, and the difficulties in making such distinctions are endemic.[138] The danger of wrongly conflating federal and state claims always exists in the intersystemic context, but the *Rooker-Feldman* doctrine has features that exacerbate it—its status as jurisdictionally inflexible, its amorphous relationship to federalism, and its insufficient articulation that makes unprincipled application too easy.

C. Federalism

Lower courts applying the doctrine tend to elide the fact that federalism runs two ways and that sometimes there is a valuable purpose

---

135 Davis v. Allen County Office of Family and Children, 114 F.3d 1191 (7th Cir. 1997).

136 The court had just dismissed another claim—that the caseworker had falsified documents—on *Rooker-Feldman* grounds, with only slightly more reasoning.

137 *Davis*, 114 F.3d at 1191.

138 In the preclusion context, we have seen that even claims within exclusively federal jurisdiction, such as antitrust claims, may have state tort counterparts. *See* Marresse v. American Academy of Orthopedic Surgeons, 470 U.S. 373 (1985). *Heck v. Humphrey*, 512 U.S. 477 (1994), has made it necessary for federal courts to determine whether a § 1983 suit for damages brought by a state prisoner is one which implies the invalidity of his conviction or sentence, a distinction which is by no means obvious. *See* HART & WECHSLER, *supra* note 4, at 1513 (referring to the difficult questions raised by the *Heck* opinion); *see also* Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) (finding that the relitigation exception to the anti-injunction act requires determination that the claims the injunction is sought to insulate have actually been decided by the state court).

to be served by providing a federal forum for the litigation of federal claims. Moreover, access to the federal forum is itself of jurisdictional magnitude. Professor Chang argued that *Rooker-Feldman* must trump § 1983, since the latter is not jurisdictional.[139] But the landscape is more complicated than he believes. First, as I mentioned above, Article III creates the federal forum and gives it attributes and protections that enable it to safeguard constitutional rights.[140] Second, § 1331 and § 1343, the jurisdictional vehicles for federal question claims, reflect a congressional determination that a federal forum is necessary to supplement inadequate state remedies for the violation of federal rights.[141] Finally, the congressional intent behind § 1983 cannot be so neatly separated from the jurisdictional directives of § 1331 and § 1343. Most federal claims, in the current understanding, cannot be raised without a statutory cause of action.[142] Section 1983 provides that cause of action in the vast majority of cases. As Professor Redish observed, there are important interrelationships between congressional jurisdictional allocations and substantive congressional programs, and the former can be improperly thwarted by disregarding the latter.[143] The civil rights amendments and their effectuating statutes were together intended to effect a historic forum reallocation; to establish the federal government as a guarantor of basic federal individual rights against incursions by state power, and to vest individuals with three kinds of protection against state governments: federal rights, federal remedies, and federal forums.[144] Thus, it is incorrect and dangerous to style the *Rooker-Feldman* doctrine as a jurisdictional imperative that does not need to be reconciled with any conflicting, equally powerful imperatives.

The general assumption that has governed the difficult management of dual sovereignty has been the assumption of mandatory concurrent jurisdiction. A litigant may pursue identical claims in state

---

139 *See* Chang, *supra* note 13, at 1367.

140 *See supra* notes 63–65 and accompanying text.

141 *See* Currie, *supra* note 17, at 320; *supra* note 26 (discussing 28 U.S.C. § 1331 and § 1343).

142 *See generally* Bandes, *supra* note 66.

143 *See* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 72–73 (1991). Chang argued that *Mitchum v. Foster*, 407 U.S. 228 (1972), did not create an exception to, or modify, § 1331 or § 1343. He neglected to mention that it treated these sections in conjunction with § 1983 as creating a federal forum for the protection of federal rights. *See Mitchum*, 407 U.S. at 242.

144 *See* Patsy v. Board of Regents, 457 U.S. 496, 503 (1982); *Mitchum*, 407 U.S. at 242; Bandes, *Unauthorized Act*, *supra* note 65, at 123; Justice Harry Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 6 (1985).

and federal courts, absent exceptional circumstances.[145] He generally may not obtain two conflicting judgments on the same claim, but that is due mainly to nonjurisdictional preclusion doctrines, with their concerns about fairness, judicial economy, and vexatious litigation. Sections 1331, 1343 and 1983, as interpreted in *Monroe v. Pape*[146] and *Patsy v. Board of Regents*,[147] establish the jurisdiction, the cause of action, and the congressional intent for supplementary state and federal relief on the same federal claim, without a requirement that state remedies be exhausted. There are statutory and prudential limitations on this general rule. Congress has not carved out a blanket civil rights exception to the Full Faith and Credit Act, and therefore a civil rights plaintiff may sometimes litigate in two forums, but his first judgment will generally be preclusive.[148] Because the Full Faith and Credit Act is not jurisdictional, Congress has the power to craft exceptions as it sees fit, depending on the particular federal statute and state interests at issue.

Though the Anti-Injunction Act provides a jurisdictional barrier to federal injunctions against ongoing state proceedings, it also provides a jurisdictional exception for § 1983 claims.[149] It thus attempts to reconcile the conflicting imperatives of state autonomy and the enforcement of federal rights. Though many § 1983 equitable actions are nevertheless barred, the barrier is prudential rather than jurisdictional.[150] The prudential nature of the bar permits consideration of the particular state and federal interests at stake.

This is not to suggest that either the courts or Congress have the formula just right. Rather, the point is that congressional and judicial articulating and weighing of competing interests is occurring, and must occur, in order to achieve the delicate and shifting balance among the statutory and prudential limits on concurrent jurisdiction. This is particularly important if we are to reconcile § 1983's prefer-

145 *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

146 365 U.S. 167 (1961).

147 457 U.S. 496 (1982).

148 *See* Migra v. Warren City Sch. Bd. of Educ., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980).

149 *See* Mitchum v. Foster, 407 U.S. 225 (1972).

150 *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (establishing prudential bar against federal injunction of ongoing state criminal proceedings, but also establishing exceptions to that bar); Huffman v. Pursue, 420 U.S. 592 (1975) (extending *Younger* to some civil actions); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (further extending *Younger*); New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989) (declining to extend *Younger*).

ence for the federal forum in civil rights cases with due respect for state autonomy. *Rooker-Feldman* is an irresistible and illegitimate invitation to federal courts to upset the balance. It requires exhaustion of state remedies without any attempt to reconcile the conflict with § 1983's guarantee of a federal remedy supplementary to any state remedy. It is in potential conflict with the *Colorado River* assumption of concurrent jurisdiction[151] and with *Mitchum v. Foster*'s holding that there is no jurisdictional bar to federal injunctions against state court judgments.[152] It extinguishes federal claims based on vague assertions of state competence and cumbersome, poorly articulated tests that have received little more than a footnote from the Supreme Court.

Rooker-Feldman encourages jurisdictional helplessness, because it offers federal courts the option of lightening their docket without taking the responsibility for ousting any particular federal claimant. The refusal of jurisdiction is often accompanied by the jurisdictional shrug that says "What could I do? The doctrine is mandatory." All that is lacking is a convincing explanation.

151 *See, e.g.*, Randolph v. Lipscher, 641 F. Supp. 767, 781 (D.N.J. 1986).

152 *See* Thompson, *supra* note 4, at 889.